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78-437

In the Supreme Court of the United States

OCTOBER TERM, 1978

JOSEPH A. CALIFANO, SECRETARY OF
HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

CINDY WESTCOTT, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

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OPINION BELOW

The opinion of the district court (App. A, *infra*, pp. 1A-37A) is not yet reported.

JURISDICTION

The order of the district court declaring unconstitutional and enjoining appellant from enforcing part of 42 U.S.C. (1970 ed. and Supp. V) 607 was entered on April 20, 1978 (App. B, *infra*, pp. 39A-42A). A notice of appeal to this Court was filed on May 17, 1978 (App. C, *infra*, pp. 43A-44A). On July 7, 1978, Mr. Justice

(1)

Brennan extended the time for docketing the appeal to and including August 15, 1978, and on August 7, 1978, he further extended the time to and including September 14, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1252. See *Weinberger v. Salfi*, 422 U.S. 749, 763 n.8 (1975).

QUESTION PRESENTED

Whether Section 407 of the Social Security Act, which provides benefits to two-parent families in which a dependent child has been deprived of parental support because of the unemployment of his father but does not provide benefits when the mother becomes unemployed, violates the Due Process Clause of the Fifth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

No person shall be * * * deprived of life, liberty, or property, without due process of law.

Section 407 of the Social Security Act, 42 U.S.C. (1970 ed. and Supp. V) 607, is set forth in App. D, *infra*, pp. 45A-48A.

STATEMENT

1. The Aid to Families with Dependent Children program, 42 U.S.C. (1970 ed. and Supp. V) 601 *et seq.*, provides financial assistance to families with needy dependent children. If a state elects to participate in the program, it must comply with the require-

ments set forth in 42 U.S.C. (Supp. V) 602(a) and the applicable federal regulations, and its plan must be approved by the Secretary of Health, Education, and Welfare in order for the state to qualify for federal reimbursement for a percentage of its expenditures. 42 U.S.C. (1970 ed. and Supp. V) 602-603. If a state that participates in the AFDC program also participates in the Medicaid program, individuals who receive AFDC benefits are entitled to receive Medicaid benefits. 42 U.S.C. (Supp. V) 1396a(a)(10).

AFDC benefits are intended to assist needy "dependent" children. The program originally was limited to children who were needy and had been deprived of the support of one parent because of that parent's death, absence, or incapacity. 42 U.S.C. 606 (a); *Batterton v. Francis*, 432 U.S. 416, 418 (1977). The Act now also provides assistance to certain families where both parents are present and neither is disabled. Section 407(a) of the Act, 42 U.S.C. 607(a), defines the term "dependent child" to include a "needy child * * * who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father * * *." This portion of the program is known as Aid to Families with Dependent Children, Unemployed Father (AFDC-UF). Although every state participates in the AFDC program, only 26 states (and the District of Columbia) participate in the AFDC-UF program. Massachusetts participates in the AFDC-UF program. 6

CHSR III, Subch. A, Pt. 301, § 301.03; Pt. 303, Subpt. A, §§ 303.01, 303.04.¹

2. In November 1976 appellees Cindy and William Westcott, who have one son, applied to the Massachusetts Department of Public Welfare for public assistance (App. A, *infra*, p. 8A). The Westcotts were informed that they did not qualify for AFDC-UF benefits because William, who was unable to find work, had not previously been employed for a sufficient period to qualify as an "unemployed" father under 6 CHSR III, Subch. A, Pt. 303, Subpt. A, § 303.04 (*id.* at 8A-9A). In February 1977 appellees Susan and John Westwood, who have one son, applied for Medicaid benefits (*id.* at 9A).² The Westwoods' application also was denied because the father's work history was insufficient (*id.* at 9A-10A).

3. Appellees then instituted this class action in the United States District Court for the District of Massachusetts, naming as defendants the Secretary of Health, Education, and Welfare and the Commissioner of the Massachusetts Department of Public Welfare. Appellees contended that Section 407 of the Social Security Act and the implementing state regu-

¹ Although Massachusetts statutes define a "dependent child" for purposes of the AFDC program to include "a needy child who has been deprived of parental support or care by reason of * * * the unemployment of a parent," Mass. Ann. Laws ch. 118, § 1 (Law. Co-op 1975), its regulations limit this aid to families where the father is unemployed. 6 CHSR III, Subch. A, Pt. 301, § 301.03; Pt. 303, Subpt. A, § 303.01.

² Pursuant to 45 C.F.R. 248.1(a)(1) and (c), a state may elect to provide Medicaid coverage to families that are eligible for AFDC benefits, but who have not applied for cash assistance. Massachusetts provides coverage for such families. Mass. Public Assistance Policy Manual, Ch. I, § F, Subd. 2a.

lations discriminate on the basis of gender in violation of the Fifth and Fourteenth Amendments to the United States Constitution. They sought declaratory and injunctive relief against continued enforcement of Section 407 and the state regulations.

The parties stipulated that the Department of Public Welfare would reconsider appellees' eligibility; it concluded that the Westcotts and the Westwoods satisfied all the requirements of eligibility for AFDC-UF benefits except for the requirement that the "unemployed" parent be the father (App. A, *infra*, pp. 9A-10A). The mother in each family is unemployed, and each mother has a work history sufficient to meet the federal and state tests of eligibility that are applied when fathers are unable to find work.³

The district court certified the case as a class action under Fed. R. Civ. P. 23(b), defining the class as all Massachusetts families who would be eligible for AFDC-UF (and therefore Medicaid) benefits but for the requirement in Section 407 that the unemployed parent be the father (App. A, *infra*, pp. 11A-19A).⁴

The court concluded that appellees had established that Section 407 violates the Due Process Clause. It stated that *Craig v. Boren*, 429 U.S. 190, 197 (1976), and *Califano v. Webster*, 430 U.S. 313 (1977), establish that gender-based distinctions are unconstitutional unless they "serve important governmental objectives and [are] substantially related to

³ The parties stipulated that the Westcotts and Westwoods would receive during this litigation the benefits they had requested, provided that they continued to meet the eligibility requirements (with the exception of the requirement that the unemployed parent be the father) (App. A, *infra*, pp. 9A-10A).

⁴ We do not contest the class certification.

the achievement of those objectives' " (App. A, *infra*, pp. 21A-22A). The court concluded that the governmental objectives of the AFDC and AFDC-UF programs are "the protection and care of needy children in families without a breadwinner's support and the maintenance of family structure and stability" (*id.* at 23A). These objectives, the court held (*id.* at 26A-28A), are not served by the gender distinction in Section 407, which denies assistance to needy children in families where the mother, who had been the breadwinner, becomes unemployed; in such cases, the court reasoned, the AFDC program encourages fathers to desert so their families can qualify for benefits (*id.* at 27A-28A). The court also stated (*id.* at 29A-30A) that the gender distinction in Section 407 "appears to rest on an 'archaic and overbroad generalization,' *Schlesinger v. Ballard*, [419 U.S. 498,] 508, about the role of women in society." Although the court acknowledged that the generalization that men are likely to be the primary supporters of their families is not without some empirical support, it found the generalization "clearly archaic and overbroad" (*id.* at 30A-31A).

Finally, the court concluded that the proper remedy is the extension of the AFDC-UF program to all families with needy dependent children where either parent is unemployed within the meaning of the Act and implementing regulations (*id.* at 34A-37A).⁵

⁵ We do not challenge the remedy, which apparently leaves the Secretary free to redefine "unemployment" by regulation in any gender-neutral way and allows any state that is dissatisfied with the Secretary's decision to withdraw from the AFDC-UF program.

THE QUESTION IS SUBSTANTIAL

The district court has declared an Act of Congress unconstitutional. Although the constitutional question is not without difficulty, and although the district court properly concluded that several decisions of this Court point toward the result it reached, we submit for the reasons that follow that Congress acted within constitutional bounds in employing a gender distinction. The constitutionality of the gender distinction in the AFDC-UF program will affect the expenditure of approximately one-half billion dollars each year.⁶ The effects of the decision of the district court thus are sufficiently serious to call for plenary review by this Court.

1. The AFDC-UF program unquestionably entails a distinction on the basis of gender. A family in which

⁶ The Secretary estimates that if the AFDC-UF program should be extended to families in which the mother but not the father is unemployed, the costs in fiscal year 1980 would be: new federal expenditures for AFDC payments, \$127.1 million; new federal expenditures to reimburse state administrative costs, \$19.4 million; new federal expenditures to reimburse state Medicaid payments, \$118.3 million; new unreimbursed state expenditures for AFDC payments, \$117.3 million; new unreimbursed state administrative expenditures, \$19.4 million; new unreimbursed state expenditures for Medicaid payments, \$109.2 million. The total of these increased costs is \$510.7 million. (However, states that now provide general assistance to needy families with unemployed mothers would realize some offsetting savings.) The Secretary anticipates that these costs would increase each year. Some states may elect to discontinue their participation in the AFDC-UF program rather than incur the costs of extending the program to families with unemployed mothers; if one or more states should discontinue participation, the actual costs would be reduced accordingly.

the father (but not the mother) is "unemployed" is eligible for benefits if it otherwise satisfies applicable need tests; a family in which the mother (but not the father) is unemployed is not eligible, even though it may have no more resources than the first family. It is important to recognize, however, that although the federal statute calls for a gender-based distinction, the result of applying the statute is not gender-biased.

The AFDC program assists families. The gender distinction contained in Section 407 does not come into play unless both parents are present in the family. The statute provides for a grant of aid, on the basis of the father's unemployment, that benefits the entire family—which necessarily includes a father, a mother, and one or more children. A denial of aid affects the whole family. The grant or denial of benefits to the entire family affects to an equal degree one man, one woman, and children of either sex or both sexes. The fact that the gender distinction in the statute thus does not discriminate in favor of or against either sex sets this case apart from previous cases in which this Court has considered gender-based distinctions, and it suggests the importance of considering the constitutionality of the statute without giving undue weight to statements in opinions that dealt with statutes having gender-biased consequences.⁸

⁸ We use "unemployed" as term of art, designating a person who not only is out of work but also meets the duration-of-employment and other criteria of the Secretary's regulations. See 45 C.F.R. 233.100.

⁸ As the disagreement among the Justices in *Califano v. Goldfarb*, 430 U.S. 199 (1977), demonstrates, it sometimes is quite

2. "[T]he Court has had difficulty in agreeing upon a standard of equal protection analysis" in cases of gender distinctions. *Craig v. Boren*, 429 U.S. 190, 210 n.* (1976) (Powell, J., concurring). In recent years this Court has decided some cases involving claims of gender discrimination under the traditional rational basis test, while in another case four members of the Court argued that strict scrutiny should be applied. Compare *Reed v. Reed*, 404 U.S. 71 (1971), with *Frontiero v. Richardson*, 411 U.S. 677 (1973). In *Craig v. Boren*, *supra*, 429 U.S. at 197, the opinion of the Court identified an intermediate standard, stating that "[t]o withstand constitutional challenge, *** classifications by gender must serve important governmental objectives and be substantially related to the achievement of those objectives."⁹ See also *Califano v. Webster*, 430 U.S. 313 (1977). However, in *Craig* and *Califano v. Goldfarb*, 430 U.S. 199 (1977), the Court produced a number of opinions indicating that it had not yet reached full agreement on a particular approach to the analysis of gender distinctions.

difficult to ascertain whether a particular statute discriminates against men or against women. But in *Goldfarb*, as in almost every other gender case that has arisen in recent years, it was clear that someone was a "loser" as a result of the statute; here, by contrast, the benefits assist families containing persons of both sexes, and it therefore is not possible to identify a "loser" on the basis of sex.

⁹ A slightly different group of Justices reiterated the *Craig* standard in *Regents v. Bakke*, No. 76-811 (June 28, 1978), slip op. 34-37 (opinion of Brennan, White, Marshall and Blackmun, JJ.). See also *id.* at 33-34 (opinion of Powell, J.).

Both Mr. Justice Powell and Mr. Justice Stevens filed opinions stating that the Court had not established a special method of scrutiny applicable to gender-based distinctions. Mr. Justice Powell stated that the traditional rational basis standard is still applicable, although it "takes on a sharper focus when we address a gender-based classification." 429 U.S. at 211 n.*. Mr. Justice Stevens argued that the Equal Protection Clause "does not direct the courts to apply one standard of review in some cases and a different standard in other cases" (429 U.S. at 211-212) and that courts should assess gender classifications by ascertaining whether they "imply that [one sex is] inferior to [the other]" or "condemn a large class on the basis of the misconduct of an unrepresentative few" or "add to the burdens of an already disadvantaged discrete minority" (430 U.S. at 218). He also emphasized that a classification that is the result of an "actual, considered legislative choice" is quite different from one that is "merely the accidental byproduct of a traditional way of thinking about females." *Id.* at 222-223 & n.9.

Mr. Justice Rehnquist, in an opinion joined by the Chief Justice and Justices Stewart and Blackmun in *Goldfarb*, argued that the standard of review should vary according to the nature of the statute in question and, because of the special nature of comprehensive schemes of social insurance, that cases employing specially rigorous scrutiny should not be "uncritically carried over into the field of social insurance legislation" (430 U.S. at 225). He observed that

because modern social insurance legislation typically is a conglomeration of incremental additions to an originally skeletal program, it often lacks the coherence that could be achieved in an omnibus statute enacted at a single time. *Ibid.* And, because social insurance affects large numbers of persons, Congress has a special and legitimate concern about "certainty in determination of entitlement and promptness in payment of benefits." *Ibid.* Consequently, Mr. Justice Rehnquist argued, when dealing with gender distinctions in social insurance legislation the Court should apply the approach of *Mathews v. Lucas*, 427 U.S. 495, 510 (1976), where it upheld a Social Security provision that treated illegitimate children differently than legitimate children, finding that "the statutory classifications challenged here are justified as reasonable empirical judgments that are consistent with [the legislative] design * * *'" (430 U.S. at 237).

3. In our view, the gender distinction in Section 407 is constitutional whether analyzed under the test of the opinion of the Court in *Craig*, the approach of Mr. Justice Powell in *Craig*, the approach of Mr. Justice Stevens in *Craig* and *Goldfarb*, or the approach of Mr. Justice Rehnquist in *Goldfarb*.

The district court erred in presuming that Congress, in enacting the AFDC-UF program, assumed that fathers generally support their families and that "mothers in two parent families are not breadwinners, so that the loss of their earnings would not substantially affect the families' well being" (App. A, *infra*, p.

30A; footnote omitted). Such assumptions would indeed be similar to the "archaic and overbroad" stereotypes underlying the classifications condemned in *Frontiero v. Richardson*, *supra*, and *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), but Congress did not indulge in them. The statutory distinction between fathers and mothers is not "the accidental byproduct of a traditional way of thinking about females." *Califano v. Goldfarb*, *supra*, 430 U.S. at 223 (Stevens, J., concurring). It is, instead, the result of a conscious decision on Congress' part to eliminate a narrow and specific flaw in the basic AFDC program, *i.e.*, that program's known tendency to induce fathers who are unable adequately to support their families to desert their homes so that their families might become eligible for welfare benefits.

President Kennedy proposed the precursor of the AFDC-UF program as a way to "eliminate one of the major concerns that has been expressed through the years about the aid to dependent children program—namely, that unemployed fathers are forced to desert their families in order that their families may receive aid." *Hearings on H.R. 3864 and 3865 Before the House Committee on Ways and Means*, 87th Cong., 1st Sess. 95 (1961) (hereinafter "*Hearings*").¹⁰

¹⁰ The House Committee report quoted the following portion of the President's state of the union message (H.R. Rep. No. 28, 87th Cong., 1st Sess. 2 (1961)):

"Under the aid to dependent children program, needy children are eligible for assistance if their fathers are deceased, dis-

Abraham Ribicoff, then Secretary of Health, Education, and Welfare, presented evidence to Congress showing that, of all the families receiving benefits under the existing program of aid to dependent children, the largest group, accounting for 65.4% of all families, consisted of those in which both parents were alive, neither was incapacitated, but the father was absent from the home. *Hearings, supra*, at 96-97. In a substantial part of this group, making up 18% of all AFDC families, the father had deserted the family. *Ibid.* Throughout the hearings numerous witnesses testified that the AFDC program was inducing fathers who became unemployed to abandon their families in order to allow them to qualify for AFDC benefits. *Hearings, supra*, at 222, 277-280, 328-334, 350, 352, 354, 358, 420, 421.

There was no evidence before Congress that any significant number of mothers deserted their families in

abled, or family deserters. In logic and humanity, a child should also be eligible for assistance if his father is a needy unemployed worker—for example, a person who has exhausted unemployment benefits and is not receiving adequate local assistance. Too many fathers, unable to support their families, have resorted to real or pretended desertion to qualify their children for help. Many other fathers are prevented by conscience and love of family from taking this route, thereby disqualifying their children under present law.

"I recommend that the Congress enact an interim amendment to the aid to dependent children program to include the children of the needy unemployed. Temporary action is recommended pending completion of a study of a permanent program to aid needy children and certain other groups now excluded from the Federal-State public assistance programs."

order to allow them to be eligible for benefits. Indeed, although Secretary Ribicoff did not provide a separate figure for families where the father was present and the mother had deserted, he presented evidence that families in which the father was present but the mother was dead, incapacitated, or absent for any reason made up only 1.8% of all AFDC families. *Hearings, supra*, at 96-97. The impetus for the enactment of Section 407 was not an outdated notion that males are more likely to desert their families than females. Congress acted on a solid basis grounded in statistical evidence. And despite the district court's suggestion (App. A, *infra*, p. 28A n.17) that there would be an incentive for the father to desert where the mother, who had been the breadwinner, became unemployed, this was not the pressing problem that confronted Congress. Based on the evidence before it, Congress reasonably could have concluded that the only problem it confronted was that of eliminating one particular incentive for unemployed fathers, to leave the home.¹¹ Thus the "sex-centered generalization [in the resulting AFDC-UF program] actually comported with fact." *Craig v. Boren, supra*, 429 U.S. at 199 (plurality opinion).

¹¹ The resulting enactment, 75 Stat. 75, made benefits available to families in which there was an unemployed "parent." But Congress from the very beginning conceived the program to apply only to unemployed fathers, and the statute was later amended to conform to that understanding. 81 Stat. 882.

The AFDC-UF program does not perpetuate outdated and unprovable concepts about the roles of the sexes. It "does not imply that [one sex is] inferior to [the other]" or "condemn a large class on the basis of the misconduct of an unrepresentative few"; it does not "add to the burdens of an already disadvantaged discrete minority." *Califano v. Goldfarb, supra*, 430 U.S. at 218 (Stevens, J., concurring). Rather, its explicit purpose is the legitimate and important one of removing the "incentive for an unemployed father to desert his family in order to make them eligible for assistance." S. Rep. No. 744, 90th Cong., 1st Sess. 160 (1967). The district court acknowledged (App. A, *infra*, pp. 27A-28A) that this is an important government objective. In attaining that objective, Congress was not obliged at the same time to enact a general remedy for unemployment or to fashion a statutory scheme that would encourage unemployed mothers to remain in the home when it had no reason to believe that such encouragement was needed. "Congress could reasonably take one firm step toward the goal of eliminating the hardship caused by * * * [limiting AFDC benefits to one-parent families] without accomplishing its entire objective in the same piece of legislation. * * * Even if it might have been wiser to take a larger step, the step Congress did take was in the right direction and had no adverse impact on persons like [appellees]." *Califano v. Jobst*, 434 U.S. 47, 57-58 (1977).

Section 407 does not "denigrat[e] * * * the efforts of women who do work and whose earnings contribute significantly to their families' support" *Weinberger v. Wiesenfeld, supra*, 420 U.S. at 645. AFDC is a non-participatory welfare program aimed at dependent children. The Act permits the payment of benefits for caretaker relatives, and, in the AFDC-UF program, to both parents, but the AFDC program was not intended as a form of unemployment compensation. It is not based on contributions or taxes of either parent, and Section 407 thus does not diminish the value of taxes previously paid by mothers. Cf. *Califano v. Goldfarb, supra*, 430 U.S. at 212 (plurality opinion).
 407
Section 407, ~~The AFDC-UF program~~, as we pointed out at pages 7-8, *supra*, does not work to the advantage or detriment of either sex.

Finally, it is clear that the limitation of Section 407 to families where the father is unemployed was the result of an "actual, considered legislative choice." *Califano v. Goldfarb, supra*, 430 U.S. at 223 n.9 (Stevens, J., concurring). When Section 407 was enacted in its present form, Congress changed the term "parent," which had been used in previous enactments that authorized the AFDC-UF program on a temporary basis,¹² to "father." Both committee reports stated that

¹² 75 Stat. 75 authorized the AFDC-UF program for one year, and the program was subsequently extended for two more temporary periods (76 Stat. 185; 81 Stat. 94) without significant change.

the AFDC-UF program "was originally conceived by Congress as one to provide aid for the children of unemployed fathers." H.R. Rep. No. 544, 90th Cong., 1st Sess. 108 (1967); S. Rep. No. 744, 90th Cong., 1st Sess. 160 (1967). Noting that some states had adopted plans under the temporary legislation that included "families in which the father is working [and] the mother is unemployed," Congress concluded that the permanent legislation would apply "only to the children of unemployed fathers." *Ibid.*

CONCLUSION

Probable jurisdiction should be noted.
 Respectfully submitted.

WADE H. McCREE, Jr.,
Solicitor General.

SARA SUN BEALE,
Assistant to the Solicitor General.

SEPTEMBER 1978.

APPENDIX A

**UNITED STATES DISTRICT COURT, DISTRICT OF
MASSACHUSETTS**

(Civil Action No. 77-222-F)

CINDY AND WILLIAM WESTCOTT ET AL.

v.

JOSEPH A. CALIFANO ET AL.

Opinion April 20, 1978

FREEDMAN, D. J.:

I: THE CLAIMS

This case is before the court on the plaintiffs' motion for partial summary judgment and the federal defendant's cross-motion for summary judgment.¹ The plaintiffs, Cindy and William Westcott and Susan and John Westwood, challenge the constitutionality of § 407 of the Social Security Act, 42 U.S.C.

¹ The plaintiffs move for partial summary judgment on their first and second claims for relief set forth in their amended complaint, which claims are based on the federal Constitution. The plaintiffs also seek relief against the state defendant based on the Equal Rights Amendment to the Massachusetts Constitution, Mass. Const. Amend. Art. 106, in their amended complaint but have not moved the court for summary judgment on the state constitutional claim.

§ 607 (hereinafter § 607), a part of the Aid to Families with Dependent Children (AFDC) program, and the implementing Massachusetts welfare regulations, 6 CHSR III, Subch. A, Pt. 301, § 301.3; Pt. 303 Subpt. A, §§ 303.01 & 303.04, which together operate to make available cash assistance (called AFDC-U benefits) and derivatively, through the Medical Assistance Program, medical assistance (called Medicaid benefits) to Massachusetts two parent families with needy children when the father is unemployed. The plaintiffs claim that 42 U.S.C. § 607 is constitutionally offensive because it creates a classification which discriminates against families with children deprived of support or care due to the unemployment of their mother, solely on the basis of sex, in contravention of the plaintiffs' rights to equal protection under the Due Process Clause of the Fifth Amendment to the United States Constitution. Concurrently, the plaintiffs contend that the implementing Massachusetts regulations violate their equal protection rights guaranteed by the Fourteenth Amendment to the federal Constitution insofar as the regulations make families with children deprived of parental support or care because of the unemployment of their mother ineligible for AFDC-U and Medicaid benefits, while providing such aid to similarly situated families where the father is unemployed. The plaintiffs seek both a declaration of the unconstitutionality of § 607 and the implementing Massachusetts regulations and injunctive relief against the continued operation and enforcement of § 607 and the challenged state welfare regulations in an unconstitutional manner by the defendants, Joseph Califano, Secretary of the U.S. Department of Health, Education and Welfare, and

Alexander Sharp, Commissioner of the Massachusetts Department of Public Welfare. The plaintiffs state their causes of action under the Civil Rights Act, 42 U.S.C. § 1983, the Declaratory Judgment Act, 28 U.S.C. § 2201, and the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* This court has jurisdiction to hear the federal constitutional claim against the federal defendant under 28 U.S.C. § 1331(a) without regard to the amount in controversy. This court also has jurisdiction to entertain the federal constitutional claim against the state defendant under 28 U.S.C. § 1343(3).² Both the federal and state defendants oppose the plaintiffs' motion for partial summary judgment. The federal defendant has made his cross-motion for summary judgment on the ground that § 607 is constitutionally permissible.

² As the state constitutional claim against the state defendant is not before the court at this time, the court expresses no opinion on whether there is pendent jurisdiction over that claim. The court also notes that this case does not present the "narrowly limited 'special circumstances,'" *Zwickler v. Koota*, 389 U.S. 241, 248 (1967), quoting *Propper v. Clark*, 337 U.S. 472, 492 (1949), for a federal court to abstain from exercising jurisdiction over the federal constitutional claims. A state court decision declaring the state regulations void on state constitutional grounds would not avoid or moot the federal constitutional claim against the federal defendant—which is, in essence,—that it is the federal policy of limiting financial assistance, in the form of matching funds for state paid benefits, on a gender basis that the state is implementing when it denies AFDC-U and derivatively Medicaid benefits on the basis of sex, and that this federal financial assistance, like other government benefits, cannot be made available on the impermissible basis of sex. Furthermore, since this federal constitutional claim cannot be avoided, and the federal constitutional claim of sex discrimination in violation of the Fourteenth Amendment against the state defendant is identical to the Fifth Amend-

Also pending before the court is the plaintiffs' motion for certification of this case as a class action. The named plaintiffs purport to represent a class of Massachusetts two parent families with minor dependent children who would otherwise be eligible to receive AFDC-U and derivatively Medicaid benefits but for the limitation in the federal statute and Massachusetts regulations which permits federally funded AFDC-U and Medicaid benefits to be provided to families deprived of support due to the fathers' unemployment but not to families deprived of support because of the unemployment of the mothers.

For the reasons stated below, the court grants the plaintiffs' motion for class certification. The court also finds that 42 U.S.C. § 607 and the implementing Massachusetts regulations are unconstitutional. The plaintiffs' motion for partial summary judgment is, therefore, granted and the federal defendant's cross-motion for summary judgment denied.

II. THE STATUTORY AND REGULATORY SCHEME

The Aid to Families with Dependent Children program, one of the public assistance programs established by the Social Security Act of 1935, represents

ment claim against the federal defendant, see note 10 *infra*, this is not a case where "evaluation * * * under the state constitution may obviate any need to consider * * * validity under the Federal Constitution." *Reetz v. Bozanich*, 397 U.S. 82, 85 (1970), quoting *Meridian v. Southern Bell T. & T. Co.*, 358 U.S. 639, 641 (1959) (per curiam). See also *Examining Bd. of Engineers, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 598 (1976), where abstention was thought improper despite the fact that a Puerto Rican statute being challenged under the Fourteenth Amendment might have violated the "broad and sweeping" provisions of the Puerto Rican Constitution.

a cooperative effort by the federal and state governments to provide financial assistance and social services to families with needy dependent children 42 U.S.C. § 601. See generally *Rosado v. Wyman*, 397 U.S. 397, 407-09, (1970); *King v. Smith*, 392 U.S. 309, 316-17 (1968). A state's participation in the AFDC program is voluntary. If a state elects to make AFDC payments, however, the state must comply with the federal statutory requirements set forth in 42 U.S.C. § 602(a) and the relevant federal regulations, and the state plan must be approved by the Secretary of Health, Education, and Welfare, 42 U.S.C. § 602, in order for the state to qualify for federal reimbursement of a percentage of its expenditures. 42 U.S.C. § 603.³

Under the AFDC program, the federal government will only contribute for aid given by the states to families whose children come within the statutory definition of "dependent." Section 606(a) of Title 42 describes a "dependent" as a "needy child * * * who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent * * *." *Id.* A further definition of "dependent" is contained in 42 U.S.C. § 607(a): "a needy child * * * who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the [HEW] Secretary) of his father * * *." *Id.* Section 607(b) sets forth

³ Although state plans must be approved by the Secretary of Health, Education, and Welfare, 42 U.S.C. § 602, the participating states are given the discretion to determine the level of benefits as well as the standard of need. See *Shea v. Vialpando*, 416 U.S. 251, 253 (1974), and cases cited therein.

some of the federal standards for the unemployment of the father: the father must be unemployed under the HEW Secretary's standards for at least 30 days, 42 U.S.C. § 607(b)(1)(A); the father has not refused a bona fide offer of employment or training within that period, *id.* § 607(b)(1)(B); and the father has a prior attachment to the work force or received or was qualified to receive unemployment compensation, *id.* § 607(b)(1)(C). It is thus the § 607 definition of "dependent" that creates the AFDC-unemployed fathers (AFDC-U) sub-program and, in conjunction with other provisions of the Act, permits federal funding of benefits provided by the states to families with children deprived of support because of the father's unemployment.⁴ See generally *Batterton v. Francis*, 432 U.S. 416 (1977).

As is the case with respects to the AFDC program, state participation in the federal-state Medicaid program is voluntary. If a state opts to participate in the Medicaid program, and the state plan is approved by the Secretary of Health, Education and Welfare, under 42 U.S.C. § 1396a(b), then, the state is provided federal reimbursement of a percentage of the cost of benefits expended on eligible individuals. 42 U.S.C. §§ 1396b and 1396d(b). The coverage of the Medicaid program is derived, at least in part, from the coverage of other public assistance programs including the AFDC program. Hence, families who receive AFDC-U benefits are among the individuals entitled to receive Medicaid benefits. 42 U.S.C. § 1396a

⁴The Act provides that AFDC benefits include payments to meet the needs of both parents, in the case of children deprived of support occasioned by the incapacity of a parent or the unemployment of a father. 42 U.S.C. § 606(b).

(a)(10). A federal regulation further allows families who are eligible for AFDC benefits but have not applied for cash assistance to be considered eligible for Medicaid benefits if their state chooses to give them medical coverage. See 45 C.F.R. § 248.1(a)(1) & (c). The limitation of federal funding to benefits paid to families with needy children deprived of support because of the father's unemployment embodied in the AFDC programs is, thus, carried over into the Medicaid program.

The State of Massachusetts has elected to make AFDC payments and provide Medicaid coverage to families with children deprived of parental support or care because of the father's unemployment. 6 CHSR III, Subch. A, Pt. 301, § 301.03; Pt. 303, Subpt. A, §§ 301.1 & 303.04; Mass. Public Assistance Policy Manual, Ch. 1, Section F, Subd. a, including unborn children, 6 CHSR III, Subch. A Pt. 301 § 301.05. In 1976, Massachusetts was one of the 28 states with an approved plan providing AFDC-U benefits, see Answer of the federal defendant to amended complaint ¶ 10 at 2, and Massachusetts continued to participate in the AFDC-U program and to provide AFDC-U payments in 1977. See Dept. of HEW, Public Assistance Statistics, Feb. 1977, table 5, p. 8 (1977). The federal reimbursement rate established for the period from July 1, 1975 to June 30, 1977 for Massachusetts was 50% for both AFDC and medical assistance benefits. See 39 Fed. Reg. 33020 (1974).

Although a Massachusetts statute currently in effect defines a "dependent" for purposes of the AFDC program as *inter alia*, "a needy child who has been deprived of parental support or care by reason of . . . the unemployment of a parent," Mass. Gen. Laws Ann. c. 118, § 1, and, consequently, would permit

AFDC and derivatively Medicaid benefits to be provided to families with needy children deprived of support because of the mother's unemployment, the state welfare regulations implement the federal policy of limiting such aid to families with an unemployed father.⁶ CHSR III, Subch. A, Pt. 301, §§ 301.03; Pt. 303, Subpt. A, § 303.01. Massachusetts has also elected to provide Medicaid to families who are eligible for AFDC but have not applied for cash assistance. Mass. Public Assistance Policy Manual, Ch. I, § F, Subd. 2a. In keeping with the federal policy, Massachusetts does not provide AFDC or Medicaid benefits to families with children deprived of support because of the mother's unemployment.

III. FACTUAL BACKGROUND

The following facts are undisputed:

Plaintiffs Cindy and William Westcott are married, reside in Massachusetts, and have an infant son who was born on June 18, 1977. Cindy Westcott, age 20, has been employed at various full-time and part-time jobs since 1972. Her last job was as a chambermaid which she held from May 1976 to November 1976, and from which she earned approximately \$50 per week. William Westcott, age 18, worked at various temporary odd jobs during the course of 1976.

In November 1976, the Westcotts applied for public assistance at the Springfield office of the Department of Public Welfare. The Westcotts were denied AFDC-U benefits by a written notice dated November 26, 1976, which stated that William Westcott did not have sufficient quarters of work to satisfy the definition of an unemployed father as required by 6

CHSR III-303, Subpt. A, § 303.04.⁵ After this lawsuit was filed, pursuant to a stipulation between the Westcotts' attorney and the attorney for the state defendant, the Westcotts' eligibility for AFDC was redetermined. In February 1977, the Department of Public Welfare determined that the Westcotts satisfied all conditions of eligibility for AFDC-U except the condition that the unemployed parent be male. Based on her work history, Cindy Westcott was found to meet the definition of "unemployed" except for the fact that she is female. That Cindy Westcott meets the definition of unemployed was sufficient, pursuant to the stipulation, for the Westcotts to be granted AFDC-U. They were provided AFDC-U benefits retroactive to November 1976, and pursuant to the stipulation, they continue to receive AFDC-U benefits based on their continued eligibility but for the requirement that the unemployed parent be male.

Plaintiffs Susan and John Westwood are married, reside in Massachusetts and have a son who was two years old in April, 1977. Since 1972, plaintiff Susan Westwood has worked part-time as a bookkeeper. She works about 10 to 15 hours per week and, from 1976 on, earned a "take-home" pay of about \$66 weekly. From January 1973 on, plaintiff John Westwood's only employment was maple sugaring for two months in 1973 and maple sugaring and logging for five months in 1974.

In February 1977, Susan and John Westwood applied for Medicaid benefits. By letters dated March 2,

⁵ The Westcotts were orally informed that they were not eligible for general relief either as a family or individually. On December 29, 1976, Cindy Westcott received a Medicaid card because she was eligible as a needy individual under 21.

1977, the Westwoods were denied Medicaid benefits because (1) neither was incapacitated so as to qualify them for MA-DA (Medicaid benefits for the disabled), and (2) John Westwood did not meet the definition of an unemployed father because of his insufficient work history.* In September 1977, the Westwoods' attorney and the state's attorney entered into a stipulation pursuant to which Massachusetts considered the Westwoods' eligibility for Medicaid benefits by applying all the Medicaid eligibility requirements for families who are eligible for AFDC-U except the requirement that the unemployed parent be male. By letter dated October 5, 1977, the Westwoods were notified by the Department of Public Welfare that they had been determined eligible to receive Medicaid. They are presently receiving only Medicaid based on their continuing eligibility but for the requirement that the unemployed parent be male.

The agreed upon facts, thus, paint the picture of two Massachusetts families with both parents present and the mother the primary wage earner who is currently unemployed within the meaning of § 607 and the implementing state welfare regulations. The families have been determined eligible to receive AFDC-U or Medicaid benefits except for the gender requirement that the unemployed parent be male. As the parties have left no genuine issue of material fact in respect to the plaintiffs' claims before the court on this motion, partial summary judgment is appropriate at this juncture. Fed. R. Civ. P. 56(a) & (c). The summary judgment procedure is the proper vehicle for disposing of constitutional questions where

* The Westwoods' child receives Medicaid as a needy individual under 21.

an adequate factual record has been presented. See *Roe v. Wade*, 410 U.S. 113 (1973); *Graham v. Richardson*, 403 U.S. 365 (1971); 6 Moore's Federal Practice ¶ 56.17[10], at 56-772-76 (2d ed. 1976).

IV. CLASS ACTION

Before reaching the merits of the plaintiffs' equal protection claims, the court will first take up the plaintiffs' motion for certification of this action as a class action under Rule 23(a) and Rule 23(b)(2), Fed. R. Civ. P. The class sought to be certified is:

those Massachusetts families with two parents in the home and with minor dependent children, born or unborn, who would otherwise be eligible for AFDC under Massachusetts' AFDC program, and hence Medicaid as well, but for the sex discrimination in the federal statute [42 U.S.C. § 607] and Massachusetts regulations [6 CHSR III, Subch. A, Pt. 301, § 301.03, Pt. 303, Subpt. A, §§ 303.01 & 303.04] which provide for the granting of federally funded AFDC and Medicaid to families deprived of support because of the unemployment of their father, but not to families deprived of support because of the mother's unemployment.

Both the federal and state defendants oppose class certification. In order for the named plaintiff to represent the proposed class, they must demonstrate that the requirements of Rule 23(a) have been met:

- (1) the class is so numerous that joinder of all members is impracticable,
- (2) there are questions of law or fact common to the class,
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and

(4) the representative parties will fairly and adequately protect the interests of the class.

The first of these requirements presents the most difficult hurdle for the plaintiffs to surmount. The plaintiffs support their claim that their class is "so numerous as to make joinder impracticable" by the presentation of the records of the Department of Public Welfare showing that numerous families have been denied AFDC-U benefits because the father did not meet the definition of unemployed. The plaintiffs then ask the court to draw the reasonable inference that a substantial number of the Massachusetts families denied AFDC-U because the father did not satisfy the definition of unemployed have mothers who would satisfy that definition. Such a conclusion, the plaintiffs contend, can reasonably be reached on the basis of labor data which suggests that there are a substantial number of low income Massachusetts two parent families with children in which the father is not in the labor force, but the mother is, who would qualify for AFDC-U if the mother is either underemployed or unemployed. The plaintiffs point out that there is no practical method for identifying class members or computing their numbers as the Massachusetts Department of Public Welfare does not compile information concerning the mother's employment history for those two parent families denied AFDC-U benefits on the ground that the father does not fulfill the definition of unemployed.

While courts have indicated that "a bare allegation of numerosity founded upon mere conjecture as to the size of the class does not satisfy the requirements of Rule 23(a)(1)," *Kinsey v. Legg, Mason & Company, Inc.*, 60 F.R.D. 91, 100 (D. D.C. 1973) and

cases cited therein, a court may draw reasonable inferences about the size of the class from the facts before it. *Doe v. Flowers*, 364 F. Supp. 953, 954 (N.D. W. Va. 1973) (per curiam), *aff'd mem.* 416 U.S. 922 (1974); *Senter v. General Motors Corp.*, 532 F. 2d 511, 523) 6th Cir., *cert. denied*, 429 U.S. 870 (1976). "The fact that the exact number of the class cannot be enumerated does not bar certification," *Lund v. Affleck*, 388 F. Supp. 137, 139-40 (D. R.I. 1975), and "[i]t is not necessary that the members of the class be so clearly identified that any member can be presently ascertained." *Carpenter v. Davis*, 424 F. 2d 257, 260 (5th Cir. 1970). It is also evident from the diversity of judicial decisions pertaining to the numerical cutoff for class membership required in order to satisfy Rule 23(a)(1), *see* 3B Moore's Federal Practice ¶ 23.05 at 23-272-74 (2d ed. 1976), that a numerical yardstick is not the determinant for class certification, rather "whether or not the numbers make joinder impracticable * * * is the test." *Dale Electronics, Inc. v. R.C.L. Electronics, Inc.*, 53 F.R.D. 531, 534 (D. N.H. 1971) (per Bownes, J.); *see also* *Walls v. Bank of Greenwood*, 20 F.R. Serv. 2d 112, 113 (N.D. Miss. 1975).

Keeping these authorities in mind, the court finds that the plaintiffs have made a showing that their class is so numerous that joinder is impracticable. The most recent records supplied by the Massachusetts Department of Public Welfare to the plaintiffs reveal that from November 1976, when the Westcotts applied for benefits, to July 1977, the number of families denied AFDC-U on the ground that the father did not meet the definition of unemployed was 135. Thirteen more families within the same period were

refused AFDC-U benefits because the child was not deprived of parental support or care.⁷ These 148 families constitute a pool of likely class members. Further, when the labor force participation of Massachusetts married women with children is considered together with recent unemployment statistics, it may also reasonably be concluded that numerous class members exist.⁸ Since the plaintiffs describe the proposed class as those who would otherwise be eligible for AFDC-U and Medicaid benefits but for the sex requirement, the class membership would include families who have not formally applied for and been denied the benefits but have been discouraged from applying because of the requirement that the unemployed parent be male and not female. *Cf. Cypress v. Newport News General & Nonsectarian Hosp. Ass'n.*, 375 F. 2d 648, 652-53 (4th Cir. 1967).

⁷ See Applications Reports, Massachusetts Department of Public Welfare, Division of Statistics, for months of November 1976, December 1976, January 1977, February 1977, March 1977, April 1977, May 1977, June 1977, July 1977 (attached to Plaintiffs' Supplemental Memorandum in Support of Plaintiffs' Proposed Findings with Respect to the Class and in Response to Defendants' Opposition to Class Certification). Deprivation of parental support according to a state regulation may result from the unemployment of the father, 6 CHSR III, Subch. A, Pt. 303, Subpt. A, § 303.01, so that families denied AFDC-U on the ground that the child was not deprived of parental support or care should also be taken into account.

⁸ A substantial proportion of Massachusetts women work. Data compiled with respect to the year 1970 indicates that 45% of all Massachusetts women were workers, and 51% of these Massachusetts women workers were married and living with their spouses. Also, in 1970, 39% of Massachusetts mothers with their own children were in the labor force. Employment Standards Administration, Women's Bureau, U.S. Dept. of Labor, *Women Workers in Massachusetts, 1970* 1-2 (1973). In 1976, 49.9% of the Massa-

The plaintiffs' inability to identify class members, moreover, buttresses their contention that joinder is impracticable. As the Fourth Circuit stated in *Doe v. Charleston Medical Center, Inc.*, 529 F. 2d 638, 645 (4th Cir. 1975), "Where the plaintiff has demonstrated that the class of persons he or she wishes to represent exists, that they are not specifically identifiable supports rather than bars the bringing of a class action, because joinder is impracticable." *See also Jack v. American Linen Supply Co.*, 498 F. 2d 122, 124 (5th Cir. 1974). The court also notes that the relief the plaintiffs are seeking is injunctive and

Massachusetts women of age 20 and above were in the civilian labor force. Bureau of Labor Statistics, U.S. Dept. of Labor, *Geographic Profile of Employment and Unemployment, 1976, Report 504, Table 3 at 15* (1977). In addition, there is statistical evidence that there have been many low income Massachusetts two parent families with infant children where the wife and not the husband was in the labor force. See U.S. Bureau of Census, *Census of the Population: 1970, Vol. 1, Characteristics of the Population, Part 23, Massachusetts, Table 209*, which indicates that in 1969 the families with an income below poverty level where the husband (under age 65) was not in the labor force and wife was in the paid labor force and children under age 6 in the household numbered 346. *Id.*

Recent national data on the unemployment of working wives suggests that a significant portion of married, working women with children under age 18 may be unemployed. In March 1975, the unemployment rate of married women was considerably higher than that for married men: 8.5% for married women as compared to 6.1% for married men. The unemployment rate for wives was highest for those with children under three years old, 16.5%, while it was lowest for wives without any children under age 18, 1.0%. Bureau of Labor Statistics, U.S. Dept. of Labor, *Monthly Labor Review, "Marital and Family Characteristics of the Labor Force, March 1975"* 52 (November 1975). In March 1975, there were 1,118,000 married women with a husband present and children under age 18 who were unemployed. *Id.* at 53, Table 2.

declaratory in nature. Where such limited relief is sought, the requirement that the class is so numerous as to make joinder impracticable has been relaxed. *See Doe v. Flowers, supra* at 954.

In respect to the other requirements of Rule 23(a) (2), (3) and (4), the court finds that the question of law common to the class is whether the defendants have violated the class members' rights to equal protection guaranteed by the Fifth and Fourteenth Amendments to the federal Constitution by not providing AFDC-U and/or Medicaid benefits to needy two parent families deprived of support because of a mother's unemployment. The claims of the Westcotts and Westwoods are typical of the claims of the class members. It appears that Cindy and William Westcott and John and Susan Westwood will fairly and adequately protect the interests of the class as their interests in receiving AFDC-U and/or Medicaid benefits are identical to the interests of the other members of the class. In addition, the named plaintiffs are represented by attorneys experienced in welfare law.

The instant case is, likewise, an appropriate one for class certification under Rule 23(b)(2) which requires that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." The First Circuit has described Rule 23(b)(2) as "uniquely suited to civil rights actions in which the members of the class are often 'incapable of specific enumeration,'" *Yaffe v. Powers*, 454 F. 2d 1362, 1366 (1st Cir. 1972), and has recently indicated that Rule 23(b)(2) actions "may be more rough-hewn than those in which the court is

asked to award damages. * * *" *Griffin v. Burns*, No. 77-1250, slip op. at 17 (1st Cir. Jan. 19, 1978). Certainly the drafters of Rule 23(b)(2) planned that the rule would cover civil rights actions where a party is allegedly discriminating unlawfully against a class whose members could not be specifically enumerated. *See Committee's Notes to Revised Rule 23*, 3B Moore's Federal Practice ¶ 23.01 [10-2] at 23.28 (2d ed. 1977). As the present case involves alleged discriminatory conduct by the state and federal governments against families who cannot be specifically identified, and final injunctive and declaratory relief is appropriate, this action may properly be maintained as a Rule 23(b)(2) class action.

The court, furthermore, wishes to express its disagreement with the federal defendant's argument advanced in opposition to class certification that a class action is neither useful nor necessary where the relief sought is declaratory and injunctive in character and would operate to bar defendant from continuing the challenged conduct. There is no language in Rule 23(b)(2), as there is in Rule 23(b)(3), that requires the court to consider the necessity of a class action for adjudication of the case, and the Rule 23(b)(3) command that a class action be "superior to other available methods for the fair and efficient adjudication of the controversy," should not be imported into Rule 23(b)(2). Cf. *Yaffe v. Powers, supra* at 1366. Other courts have recently found that class certification was the proper course to follow in the face of similar claims by defendants that certification was unnecessary. In *Hoehle v. Likins*, 538 F. 2d 229 (8th Cir. 1976), *rev'd in part* 405 F. Supp. 1167 (D. Minn. 1975), for example, which involved a challenge to a state's AFDC "flat grant" allocation sys-

tem, the Eighth Circuit reversed the denial of class certification by a federal district court. 538 F. 2d at 231. Although the requirements for a class action had been satisfied, the district court had erroneously refused to grant class action status because the relief would have been identical and have benefitted the proposed class members without class certification. 405 F. Supp. at 1175. *See also Mendoza v. Lavine*, 72 F.R.D. 520, 523 (S.D. N.Y. 1976). One Court of Appeals has perhaps gone a step farther and indicated that where Rule 23 requirements have been fulfilled, a court may not deny class certification. *Fujishima v. Board of Education*, 460 F. 2d 1355, 1360 (7th Cir. 1972); *see also Driver v. Helms*, 74 F.R.D. 382, 405 n. 27 (D. R.I. 1977). Although this court declines to take that additional step, because the wording of Rule 23(b) suggests that certification is to some extent discretionary,⁹ *Schneider v. Margosian*, 349 F. Supp. 741 (D. Mass. 1972) (Supp. Mem. and Order), I recognize that class action status may afford class members protection against the risk of mootness of the named plaintiff's claim, *Sosna v. Iowa*, 419 U.S. 393, 399 (1975); *Hoehle v. Likins*, 538 F. 2d at 231; *Morales v. Minter*, 393 F. Supp. 88, 91 n. 5 (D. Mass. 1975), and may facilitate the enforcement of a favorable judgment where a defendant fails to comply with a court order. *See, e.g., Class v. Norton*, 505 F. 2d 123 (2d Cir. 1974); *Kilfoyle v. Hegison*, 417 F. Supp. 239, 243 (W.D. Pa. 1976). Hence, class certification is not an empty formality, even in a case where declaratory and injunctive re-

⁹ Rule 23(b) provides that "An action *may* be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition * * *." Fed. R. Civ. P. 23(b). [Italic added.]

lief would automatically inure to the benefit of those similarly situated with the plaintiffs. Accordingly, the plaintiffs' motion to proceed as a class action is granted.

V. EQUAL PROTECTION

At last the court reaches the plaintiffs' equal protection claims. The plaintiffs allege that § 607 and the Massachusetts implementing regulations which govern the availability of AFDC and Medicaid benefits to two parent families create a gender based classification, as the difference between those two parent families who are eligible to receive AFDC-U benefits and those ineligible is the sex of the unemployed parent. If the father in a two parent family otherwise eligible meets the definition of unemployed, then his family may receive the benefits. In contrast, if the mother in a two parent family otherwise eligible satisfies the definition of unemployed, her family may not. This court heartily agrees that the statutory and regulatory distinction, thus established, is gender based. It is certainly as much as sex-based classification as those legislative distinctions which have been made between widows and widowers, recognized in *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), and husbands and wives, in *Frontiero v. Richardson*, 411 U.S. 677 (1973).

Such a gender based classification is subject to scrutiny under the equal protection principles embraced in the Fifth Amendment's Due Process Clause and the Fourteenth Amendment's equal protection guarantee.¹⁰ *Reed v. Reed*, 404 U.S. 71, 75 (1971);

¹⁰ Although the Fifth Amendment does not contain an equal protection clause, the Fifth Amendment's guarantee of due process has been interpreted to forbid discrimination that is "so un-

Craig v. Boren, 429 U.S. 190, 197 (1976). Beginning with the 1971 decision in *Reed v. Reed*, *supra*, the United States Supreme Court has upheld many claims of sex discrimination in violation of equal protection principles.¹¹ A significant number of claims of discrimination on the basis of gender, however, have also been rejected by the Supreme Court mainly on the rationale that such gender classifications were compensatory for women, first expressed in *Kahn v. Shevin*, 416 U.S. 351 (1974).¹² Despite this burgeoning case law, the standard of review of gender based classifications has not been altogether clear.

In *Reed*, *supra* at 76, wherein a unanimous court struck down an Idaho statutory provision which gave a mandatory preference to males over females for appointment as administrators of estates of persons dying intestate, Justice Burger employed a vigorous rational basis standard: "A classification 'must be reasonable, not arbitrary; and must rest upon some ground of difference having a fair and substantial

justifiable as to be violative of due process.' *Schneider v. Rusk*, 377 U.S. 163, 168 (1964), quoting *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). Moreover, the Supreme Court's approach to equal protection claims under the Fifth Amendment has mirrored that under the Fourteenth Amendment. *Weinberger v. Wiesenfeld*, *supra* at 638, n. 2.

¹¹ See, e.g., *Frontiero v. Richardson*, *supra*; *Weinberger v. Wiesenfeld*, *supra*; *Stanton v. Stanton*, 421 U.S. 7 (1975); *Craig v. Boren*, *supra*; *Califano v. Goldfarb*, 430 U.S. 199 (1977).

¹² See, e.g., *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Califano v. Webster*, 430 U.S. 313 (1977). See also *Geduldig v. Aiello*, 417 U.S. 484 (1974), in which the Court declined to find that the provision of California's disability insurance plan which excepted from coverage disability resulting from normal pregnancy violated the equal protection clause. The Court refused to view *Aiello* as a sex discrimination case. *Id.* at 496, n. 20.

relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)." Although, two years after the *Reed* decision, four members of the Court in *Frontiero v. Richardson*, *supra*,¹³ indicated their willingness to recognize sex as a suspect classification, which, like race, national origin and alienage, would require strict judicial scrutiny, a majority of the Court has apparently declined to do so. *Stanton v. Stanton*, 421 U.S. 7, 13 (1975). See *Fortin v. Darlington Little League, Inc.*, 514 F. 2d 344, 348 (1st Cir. 1975).

More recently, in *Craig v. Boren*, *supra*, the Supreme Court enunciated an intermediate standard of review for determining whether a gender based classification abridges equal protection rights under the Fifth or Fourteenth Amendments. Relying on the *Reed* opinion and succeeding cases, Justice Brennan, who wrote the opinion of the Court in *Craig*, stated that, in order to survive an equal protection challenge, "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." 429 U.S. at 197. Employing this standard in *Craig*, the Court held that the sex based distinction in Oklahoma's 3.2 beer statute, which prohibited the sale of "non-intoxicating" liquor to males under the age of 21 and to females under 18, denied males aged 18-20 equal pro-

¹³ In *Frontiero*, a majority of the Court found unconstitutional the federal statutory scheme that provided the wife of a male member of the uniformed services certain dependents' benefits without proof of actual dependency, but did not provide the same benefits to the husband of a female member of the uniformed services except upon proof that she actually provided more than one-half of her husband's support. 411 U.S. at 691.

tection of the laws. Although only four members of the Court subscribed to the intermediate standard for equal protection analysis in *Craig*, five members of the Court apparently adopted the *Craig* test in a subsequent case in which the Court reviewed a gender classification in the Social Security Act, *Califano v. Webster*, 430 U.S. 313 (1977).¹⁴ The *Craig* standard would, thus, appear to be the prevailing standard of review of sex based classifications although the vigorous rational basis test of *Reed* has not been clearly differentiated from the *Craig* standard. See *Meloon v. Helgemo*, 564 F. 2d 602-05 & n. 3 (1st Cir. 1977).

In applying the *Craig v. Boren* standard in this case, the court will first identify the important governmental objectives of the legislation being challenged. Then, as a second step, the court will determine whether the divergent treatment accorded the sexes by the legislation can fairly be said to serve these objectives. Under this two step approach, this court reaches the conclusion that the gender based classification embodied in 42 U.S.C. § 607 and the implementing Massachusetts regulations cannot withstand an equal protection attack.

In taking the first step, a review of the legislative history and changes in the statutory language demon-

¹⁴ In *Craig*, the four members of the Court who subscribed to the intermediate standard were Justices Brennan, White, Marshall and Blackmun. In *Califano v. Goldfarb*, 430 U.S. 199 (1977), decided within three months after *Craig*, four members of the Court again joined in an opinion endorsing the use of the *Craig* test, but it was a different four members, Justices Brennan, White, Marshall and Powell. *Califano v. Webster*, *supra*, which closely followed *Goldfarb*, was a unanimous decision. The *per curiam* opinion employed the *Craig* test, and only four members of the Court joined in a separate opinion concurring in the judgment which did not apply the *Craig* test.

strates that the important governmental objectives of the AFDC program and the AFDC-U segment are the protection and care of needy children in families without a breadwinner's support and the maintenance of family structure and stability. Cf. *Ramos v. Montgomery*, 313 F. Supp. 1179, 1181 (S.D. Cal. 1970), *aff'd*, 400 U.S. 1003 (1971). The paramount congressional concern that motivated the enactment of the Social Security legislation including the passage of the Aid to Dependent Children program, the forerunner name of the AFDC program, was the welfare of children in the aftermath of the depression. A Senate Report on the proposed Social Security bill declared that the "heart of any program for social security must be the child * * * Children are in many respects the worst victims of the depression." S. Rep. No. 628, 74th Cong., 1st Sess. 16-17 (1935). See also H.R. Doc. No. 615, 74th Cong., 1st Sess. 9-10 (1935); Message of the President Recommending Legislation on Economic Security, House Doc. No. 81, 74th Cong., 1st Sess. 29 (1935). However, because Congress believed that many children were in need as a result of the unemployment of the breadwinner in the family, and that these children would be "benefited through the work relief program and still more through the revival of private industry," S. Rep. 628, 74th Cong., 1st Sess. 17 (1935), the coverage of the Aid to Dependent Children Program did not include families of the unemployed but was initially limited to families with at least one parent deceased, absent from the home or incapacitated. Social Security Act § 406, 49 Stat. 629 (1935). Those persons who the Aid to Dependent Children Program was originally designed to protect were described as the "fatherless and other 'young' families without a breadwinner." Message of

the President on Economic Security, House Doc. No. 81, 74th Cong., 1st Sess. 4 (1935).

In 1961, Congress enacted the legislation that extended the program's aid on a temporary basis to needy children who were dependent as a result of the unemployment of a parent. Social Security Act § 407, 75 Stat. 75 (1961). See H.R. Rep. No. 28, 87th Cong., 1st Sess. 1-2 (1961). The debates in Congress concerning the expansion of the program's coverage indicate that the overriding goal of the temporary legislation was the care and protection of the needy child who had been deprived of his economic and social well being because of the involuntary unemployment of the "breadwinner" in the family. See, e.g., 107 Cong. Rec. 3759 (remarks of Rep. Lane); 107 Cong. Rec. 3761 (remarks of Rep. Mills, sponsor of the Bill); 107 Cong. Rec. 3761-62 (remarks of Rep. Perkins); 107 Cong. Rec. 3767 (remarks of Rep. Byrnes); 107 Cong. Rec. 3768 (remarks of Rep. McCormack); 107 Cong. Rec. 6401 (remarks of Sen. McCarthy). The actual statutory language used by Congress to expand coverage of the program was sex-neutral as the term "dependent" was given the additional definition of a needy child "who has been deprived of parental support or care by reason of the unemployment . . . of a parent." Social Security Act § 407, 75 Stat. 75 (1961) (emphasis added).¹⁵

¹⁵ The legislators at times during the Congressional debates used the term "father" interchangeably with the terms "bread-winner," "worker" and "wage earner." This usage apparently reflected their belief that the father is generally the primary wage earner of the family and the mother the "homemaker." The legislators, however, did not limit the coverage of the statute on a gender basis as the statutory term used was "parent," a sex-neutral one, and not "father." It is also noteworthy that coverage of children deprived of parental support or care because of maternal as well as paternal

A second legislative goal which Congress had in mind when it created the legislation providing for aid to needy children of unemployed parents was the stability of the family. By providing assistance to families with both parents present, where one was unemployed, Congress hoped to counteract the incentive for desertion and, in particular, the incentive for the real or pretended desertion of fathers, inherent in a program where assistance was available in the event of the absence from the home of a parent. See H.R. Rep. No. 28, 87th Cong., 1st Sess. 2 (1961). This goal was reiterated in respect to the 1962 legislation which extended for five years the temporary unemployed

unemployment was contemplated. See, e.g., 107 Cong. Rec. 3763 (remarks of Rep. Doyle).

"If we underestimate at all, we make a mistake in not estimating the very serious psychological, as well as economical result this clear situation of continuing and increasing unemployment has upon the minor children in these millions of homes * * *. Not least of all, where the usual breadwinner is forced to be idle is the spirit, is the ambition, is the understanding of the minor children tarnished, weakened and in many cases caused to be seared with a lack of understanding as to why it should be necessary for his *father*, or his *mother*, to be unable to earn when that *father*, or that *mother*, that *breadwinner*, is entirely willing to go to work to support his or her own minor children and keep them in school * * *.

* * * * *

" . . . For, I am sure, I only have to briefly mention that as the present children and youth of our Nation are raised, and, as the conditions under which they are raised will largely help to determine not only their character as they grow older, but the ultimate worth and value to our Nation of these children, for whom there is need in the homes of America where there is continuing involuntary unemployment by the homes' breadwinners, it is absolutely imperative * * * that the hazards and destructions in such homes, thus caused, shall be terminated at the earliest possible date." *Id.* (italic supplied).

parents segment of the program. Social Security Act § 401 et seq., 76 Stat. 185 (1962); *see H.R. Rep. No. 1414*, 87th Cong., 2d Sess. 9 (1961). The goal of family stability evident from the legislative history of § 607 was consistent with one of the stated objectives of the entire program set forth in 42 U.S.C. § 601 "to help maintain and strengthen family life." *Id.*

It was only in 1968 when Congress decided to make the AFDC-U program permanent, as part of an overhaul of the Social Security Act, that it fashioned legislation along gender lines. A dependent was redefined as a needy child deprived of parental support or care by reason of the *father's* unemployment. Social Security Act § 407(a), 81 Stat. 882 (1968). The legislative reports revealed that Congress deliberately created the gender distinction so as to exclude families with unemployed mothers from the program's coverage. The House Report stated:

This program was originally conceived as one to provide aid for the children of unemployed fathers. However, some States make families in which the father is working but the mother is unemployed eligible. The bill would not allow such situations. Under the bill, the program could apply to the children of unemployed fathers.

H.R. Rep. No. 544, 90th Cong., 1st Sess. 108 (1967); *see also* S. Rep. No. 744, 90th Cong., 1st Sess. 160 (1967). No clear explanation for the redefinition, however, was offered so that despite the gender change in the legislative language the important governmental objectives of the AFDC and AFDC-U legislation apparently remained unchanged.

Turning to the second step under the *Craig v. Boren* standard, the Court finds that the gender dis-

tinction inserted in § 607 and carried over into the implementing Massachusetts welfare regulations does not serve the important governmental objectives of the AFDC program and its AFDC-U segment. First, the sex based distinction does not further the important governmental objective of providing financial assistance to families with needy children who are without the support of a breadwinner, and in particular, to those families where the breadwinner becomes unemployed and is unable to provide for their economic well being. In denying assistance when the female working parent becomes unemployed, many families with needy children, the targets of the AFDC program, go unaided. Indeed, in view of the legitimate legislative goal of assisting families with needy children without a breadwinner's support, the sex based differentiation in § 607 and the implementing Massachusetts regulations is irrational. It creates two groups of two parent families with needy children who are without support because the wage earner is unemployed: one group where the wage earner is male, and a second where the wage earner is female. The first group may receive AFDC-U and Medicaid benefits, but the second may not.

Secondly, the important governmental objective of family stability is not served but rather is thwarted by the sex based differentiation. The two parent family with a female breadwinner will not receive AFDC or Medicaid benefits if she becomes unemployed but will if either parent leaves the home.¹⁶ Thus, even

¹⁶ According to the uncontradicted affidavit of two of the named plaintiffs in this case, Cindy and William Westcott, their landlord, who was seeking overdue payment of their rent, suggested that they separate so that Cindy and her unborn child would be eligible to receive AFDC benefits. Affidavit of Cindy and William Westcott, June 6, 1977, ¶ 16 at 4.

the more specific legislative objective of removing the structural incentive for fathers to desert their families in order to receive AFDC or derivatively Medicaid benefits is not served by the gender distinction.¹⁷ Family breakup, and not family stability, is a likely result of the gender differentiation.¹⁸

Section 607 and the implementing state regulations, moreover, cannot be saved from unconstitutionality by

¹⁷ The defendants have argued that § 607 is substantially related to serving two important governmental interests which are not served by providing similar benefits to families with unemployed mothers: minimizing abuse and maintaining the viability of the family as a unit by lessening the economic incentive for the father to desert because of his unemployment. In respect to the goal of minimizing abuse, the defendants have not articulated how § 607 furthers their goal except to state the obvious that the operation of § 607 precludes payments to some families. With regard to the objective of removing the economic incentive for the father's desertion, the court believes that that goal is subverted by limiting the coverage of the program on a gender basis to two parent families with needy children deprived of support because of paternal unemployment and not parental unemployment. Where the mother is the breadwinner and she becomes unemployed, there is still an economic incentive for the father to desert. The defendants also suggest that the legislative choice embodied in § 607 should not be overturned because of the latitude afforded the legislature to address a problem step by step. The view that sex based classifications are entitled to the same kind of deference as are classifications based on other policies and interests within the context of social welfare legislation, however, has been recently rejected. See *Califano v. Goldfarb*, *supra* at 212 & n. 9 (1977) (Opinion of Brennan, J., in which White, J., Marshall, J. and Powell, J., joined).

¹⁸ Hence, even under the different language of the vigorous rational basis test of *Reed*, the gender distinction in § 607 and the state regulations offends equal protection principles as an unreasonable classification which rests upon a ground of difference not fairly or substantially related to the objects of the legislation.

the assertion that they are designed to rectify past discrimination against women. See *Kahn v. Shevin*, *supra*; *Schlesinger v. Ballard*, 419 U.S. 498 (1975).¹⁹ Unlike the widows' property tax exemption in *Kahn* or the longer tenure period for female naval officers upheld in *Schlesinger v. Ballard*, *supra*, the different treatment accorded the sexes by § 607 and the challenged Massachusetts welfare regulations does not operate to compensate women for past discrimination, economic or otherwise. Section 607 and the implementing state regulations do just the opposite. They penalize the women wage earner and her family by denying her and her family the benefits of income maintenance and medical assistance when she becomes unemployed.

Not only does the gender distinction in § 607 and the implementing Massachusetts regulations fail the *Craig v. Boren* test, however, it is also constitutionally impermissible because it appears to rest on an "archaic and overbroad generalization," *Schlesinger v.*

¹⁹ In the *Kahn* case, the Court found constitutional a Florida statute granting widows but not widowers a \$500 property tax exemption and, in so doing, characterized the statute as "a state tax law reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden." 416 U.S. at 355. And in *Schlesinger*, the Court concluded that a federal legislative scheme providing for a 13-year tenure period before mandatory discharge only for female commissioned naval officers, but not for their male counterparts, was constitutionally permissible. The Court reasoned that the statutory distinction was premised on the differing professional opportunities that had been afforded female and male naval officers, and that a longer tenure period for women officers was consistent with the purpose of giving female officers fair programs for career advancement. 419 U.S. at 508.

Ballard, supra at 508, about the role of women in society. See *Stanton v. Stanton, supra* at 14; cf. *Taylor v. Louisiana*, 419 U.S. 522 (1975).²⁰ The gender differentiation in § 607 and the implementing Massachusetts regulations rests on the assumption that mothers in two parent families are not breadwinners, so that loss of their earnings would not substantially affect the families' well being.²¹ Although "the notion that men are more likely to be the primary supporters

²⁰ In *Stanton*, the Court ruled, in the context of a suit brought to enforce a parent's obligation of child support, that a Utah statute specifying a different age of majority for males than for females violated the equal protection clause. 421 U.S. at 17. In so ruling the Court rejected outdated notions about females as a basis for legislating and noted: "[N]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas." *Id.* at 14-15. In *Taylor*, the Court found that the systematic exclusion of women from jury panels from which petit jurors were drawn violated the defendant's "Sixth Amendment right to trial by an impartial jury drawn from a fair cross section of the community." 419 U.S. at 536. Labor statistics demonstrating the significant participation of women in the work force "put to rest the suggestion that all women should be exempt from jury service based solely on their sex and their presumed role in the home." *Id.* at 535 n. 17.

²¹ See Griffiths, *Sex Discrimination in Income Security Programs*, 49 *Notre Dame Law* 534, in which the author concluded: "AFDC eligibility requirements also show legislators' lack of concern about unemployment among women. In states which provide AFDC to two-parent families, families with an *unemployed* father and an *unemployed* mother may qualify, but families with an *employed* father and *unemployed* mother may not. In 1961 when Congress first provided for federal aid to children who were in need as the result of the unemployment of a parent, such unemployment included that of either a mother or a father. However, in 1968 Congress changed the law to include only the unemployment of the father. Such is the strength of the assumption that the father is the breadwinner." *Id.* at 543 (footnote omitted).

of their spouses and children is not entirely without empirical support," *Wiesenfeld v. Weinberger, supra* at 645, an assumption that all mothers are not breadwinners is clearly archaic and overbroad in view of recent labor force data which indicates that working wives with children do contribute significantly to their families' earnings.²² Where the "archaic and overbroad generalization" that women are not breadwinners has provided the foundation for other legislation, the Supreme Court has not been reluctant to declare its unconstitutionality. See *Weinberger v. Wiesenfeld, supra* at 643.²³ Consequently, the gender distinction in § 607 and the companion state regulations which rests on the notion that mothers in two parent families are not breadwinners cannot be tolerated under the equal protection clause.

The decisions of the Supreme Court in cases involving gender classifications within the Social Security Act also lead this court to the conclusion that § 607 and the state regulations offend the concept of equal

²² The median contribution of all wives who worked during 1974 was one-fourth of the family income. Bureau of Labor Statistics, U.S. Dept. of Labor, *Monthly Labor Review*, "Marital and Family Characteristics of the Labor Force, March 1975," 55 (November 1975). Twelve percent of all working wives or approximately 2.5 million wives contributed one-half or more of the family income. Women's Bureau, U.S. Dept. of Labor, *Women Workers Today*, 9 (1976). It has been noted that a working wife's contribution to the family earnings is crucial when it pushes the family income over poverty level. *Id.*

²³ The *Wiesenfeld* Court indicated that an "archaic and overbroad generalization *** not *** tolerated under the Constitution" was the notion that "male workers' earnings are vital to the support of their families, while the earnings of female wage earners do not significantly contribute to their families' support." *Id.* at 643.

protection. Of particular significance is *Weinberger v. Wiesenfeld*, *supra*, in which the Court ruled unconstitutional 42 U.S.C. § 402(g), a subsection of the Social Security Act providing for the payment of survivors' benefits based on the earnings of a deceased husband to his widow and the minor children of the couple while such benefits were not payable to the widower. In *Wiesenfeld*, the Court emphasized that § 402(g) operated so as "to deprive women of protection for their families which men receive as a result of their employment," *id.* at 645, and further observed that, in view of the legislative purpose of permitting the surviving parent to stay at home to care for the children, the classification also discriminated among surviving children solely on the basis of the sex of the surviving parent. *Id.* at 651. Relying heavily on the reasoning in *Wiesenfeld*, a plurality of the Court in *Califano v. Goldfarb*, 430 U.S. 199 (1977), condemned another provision of the Social Security Act, 42 U.S.C. § 402(f)(1)(D), that required widowers but not widows to prove dependency on their deceased spouses in order to qualify for survivors' benefits.²⁴ In the plurality's view § 402(f)(1)(D) discriminated against the covered female wage earner by giving her less protection for her surviving spouse than that afforded a male worker. *Id.* at 206-07. (Opinion of Brennan, J.).²⁵ The *Wiesenfeld* reasoning also applies with full force to the present case. Section 607 and the implementing

²⁴ The decision in *Frontiero v. Richardson*, *supra*, also weighed heavily in the plurality opinion in *Goldfarb*.

²⁵ In *Goldfarb*, Justice Stevens concurred in the judgment of the Court on the basis that the discrimination was not against the covered female wage earner but against the surviving male spouse. *Id.* at 218.

Massachusetts regulations function so as to deprive females of protection for their families that males receive in the event of unemployment, and they discriminate among the group, families with needy children, sought to be protected by the legislation.²⁶ In one important respect, however, this court believes that the discrimination worked by § 607 and the challenged state regulations is more harmful. The Social Security benefits denied in *Wiesenfeld* and *Goldfarb* were not subsistence or medical care payments designed to meet the basic needs of the plaintiffs as are the benefits denied the plaintiffs in the instant case.

Accordingly, for all of the foregoing reasons, this court finds that § 607 and the implementing Massachusetts regulations are unconstitutional.

²⁶ Three weeks after the decision in *Goldfarb* was rendered, the Court summarily affirmed the judgments of three separate three-judge courts holding another provision of the Social Security Act unconstitutional. See *Califano v. Silbowitz*, 430 U.S. 924 (1977), *aff'g*, 397 F. Supp. 862 (S.D. Fla. 1975); *Califano v. Jablon*, 430 U.S. 924 (1977), *aff'g*, 399 F. Supp. 118 (D. Md. 1975); *Califano v. Abbott*, 430 U.S. 924 (1977), *aff'g*, — F. Supp. — (N.D. Ohio 1976). See also *Railroad Retirement Bd. v. Kalina*, 431 U.S. 909 (1977), *aff'g*, 541 F.2d 1204 (6th Cir. 1976).

Only in *Califano v. Webster*, *supra*, has the Court in its recent line of decisions upheld a sex based distinction in the Social Security Act. The provision involved in *Webster* was the former 42 U.S.C. § 415 that had permitted a more favorable formula to be used to calculate old age benefits for a retired female worker than for a retired male worker before the statute was amended to eliminate gender distinction. Adopting the *Kahn v. Shevin*, *supra*, approach, the Court found that the favorable treatment was a deliberately made Congressional decision to compensate women for past economic discrimination in the job market. 430 U.S. at 318.

VI. REMEDY

Because the court finds § 607 and the implementing Massachusetts welfare regulations unconstitutional, a final question arises in respect to the proper remedy. The court must decide "whether it more nearly accords with Congress' wishes to eliminate its policy altogether or extend it in order to render what Congress plainly did intend, constitutional * * *." *Welsh v. United States*, 398 U.S. 333, 355-56 (1970) (Harlan, J., concurring). There are thus two remedial choices: elimination of the AFDC-U subprogram altogether because of its constitutional imperfection or extension of AFDC-U, and derivatively, Medicaid benefits to those persons previously unconstitutionally excluded, the plaintiffs and the members of their class. In deciding whether to extend the coverage of the unconstitutional legislation to persons previously excluded or not, the court notes that the existence of a broad severability clause in the Social Security Act²⁷ reflects the Congressional wish that judicial interpretation of the Act leave as much of the statute intact as possible. *Id.* at 364; *Robinson v. Johnson*, 352 F. Supp. 848, 860 (D. Mass. 1973), *rev'd on other grounds*, 415 U.S. 361 (1974).

The test to determine whether extension or nullification is the proper remedial path to follow in such a case as the present one was articulated by Justice Harlan in *Welsh v. United States*, *supra*: "it is necessary to measure the intensity of commitment to

²⁷ The severability clause of the Social Security Act, 42 U.S.C. § 1303, provides: "If any provision of this chapter, or the application thereof to any person or circumstance, is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances shall not be affected thereby." *Id.*

the residual policy and consider the degree of disruption of the statutory scheme that would occur by extension as opposed to abrogation." *Id.* at 365. Under this test, extension is the appropriate remedial measure. Since 1935, Congress has been committed to the legislative policy of providing financial assistance to needy dependent children and their families. Congress has repeatedly demonstrated its commitment to the more specific goal of assisting needy children and their families where there is parental unemployment by reenacting for five years and then making permanent the AFDC-U subprogram when it was originally passed as only a temporary measure. Extension of the coverage of the AFDC-U and derivatively the Medicaid programs is also less likely to disrupt the operation of these programs than would nullification. With respect to the future operation of these programs, families with unemployed mothers would simply be permitted to follow the same procedures and to show that they fulfill the same need and other eligibility standards that currently apply to families with unemployed fathers. In contrast, if provision of AFDC-U and derivatively Medicaid benefits were halted because of the constitutional defect, many persons would lose their very means of subsistence.

The decisions of the Supreme Court in *Weinberger v. Wiesenfeld*, *supra*, and *Califano v. Goldfarb*, *supra*, are also controlling on the question of the proper remedy. In both cases, the Supreme Court affirmed the judgment of three-judge district courts where extension of benefits that had been previously unconstitutionally denied to the plaintiffs had been ordered. See *Wiesenfeld v. Secretary of HEW*, 367 F. Supp. 981, 991 (D. N.J. 1973); *Goldfarm v. Secretary, HEW*

396 F. Supp. 308, 309 (E.D. N.Y. 1975). Just last term, the Court summarily affirmed the judgment of a three-judge district court in *Califano v. Jablon*, 431 U.S. 924 (1977), *aff'g*, 399 F. Supp. 118 (D. Md. 1975), in which the lower court decided to extend the social security benefits to persons who previously had to satisfy a proof of dependency requirement. 399 F. Supp. at 132.

As it appears to the court that the proper remedy in this case is extension rather than nullification an order will enter declaring 42 U.S.C. § 607 unconstitutional insofar as it establishes a classification which discriminates against families with children deprived of support or care because of the unemployment of the mother solely on the basis of sex, in violation of the plaintiffs' equal protection rights under the Due Process Clause of the Fifth Amendment to the United States Constitution; and enjoying the operation or enforcement of § 607 by defendant Califano insofar as it prohibits him from approving a Massachusetts plan or federal matching funds for Massachusetts to pay AFDC or Medicaid benefits to families deprived of support or care because of the unemployment of the mother. The order will also declare that 6 CHSR III, Subch. A, Pt. 301, § 301.03; Pt. 303, Subpt. A, §§ 303.01 & 303.04 are unconstitutional insofar as they make ineligible for AFDC benefits and derivatively Medicaid benefits families with children deprived of support or care because of the unemployment of the mother, while providing such benefits to families with children deprived of support because of the unemployment of the father in violation of the plaintiff's rights to equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution; and will enjoin the operation or en-

forcement of 6 CHSR III, Subch. A, Pt. 301, § 301.03; Pt. 303, Subpt. A, §§ 303.01 & 303.04 insofar as they prohibit defendant Sharp from granting AFDC and Medicaid to families with children deprived of support or care because of the unemployment of their mother. Finally, the order will enjoin defendant Sharp from refusing to grant AFDC and Medicaid benefits to families with children deprived of support or care because of the unemployment of the mother in the same amounts and under the same standards as he provides such benefits to families with children deprived of support or care because of the unemployment of the father.

It will be so ordered.

FRANK H. FREEDMAN,
United States District Judge.

APPENDIX B

United States District Court
District of Massachusetts

Civil Action No. 77-222-F

CINDY AND WILLIAM WESTCOTT ET AL.
v.
JOSEPH A. CALIFANO ET AL.

Order, April 20, 1978
FREEDMAN, D.J.

For the reasons stated in the opinion entered this date in the above entitled case, the plaintiffs' motion for partial summary judgment is hereby granted and the federal defendant's motion for summary judgment is denied. The plaintiffs' motion for the case to proceed as a class action is also granted.

It is therefore ORDERED by the Court that the plaintiffs, Cindy and William Westcott and Susan and John Westwood, represent a class which consists of:

those Massachusetts families with two parents in the home and with minor dependent children, born or unborn, who would otherwise be eligible for AFDC under Massachusetts' AFDC program, and hence Medicaid as well, but for the sex discrimination in the federal statute [42 U.S.C. § 607] and Massachusetts regulations [6 CHSR III, Subch. A, Pt. 301, § 301.03; Pt. 303, Subpt. A, §§ 303.01 & 303.04] which provide for the granting of federally funded AFDC and Medicaid to fam-

ilies deprived of support because of the unemployment of their father, but not to families deprived of support because of the mother's unemployment.

It is also ORDERED by this Court that 42 U.S.C. § 607 is declared unconstitutional insofar as it establishes a classification which discriminates against families with children deprived of support or care because of the unemployment of the mother solely on the basis of sex, in violation of the equal protection rights under the Due Process Clause of the Fifth Amendment to the United States Constitution of the plaintiffs and the members of their class; and that the Massachusetts regulations, 6 CHSR III, Subch. A, Pt. 301, § 301.03; Pt. 303, Subpt. A, §§ 303.01 & 303.04, are declared unconstitutional insofar as they make ineligible for AFDC benefits and derivatively Medicaid benefits families with children deprived of support or care because of the unemployment of the mother, while providing such benefits to families with children deprived of support because of the unemployment of the father in violation of the rights of the plaintiffs and members of their class to equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

Because the Court finds that 42 U.S.C. § 607 is unconstitutional insofar as it establishes a classification which discriminates against families with children deprived of support or care because of the unemployment of the mother solely on the basis of sex, in violation of the equal protection rights under the Due Process Clause of the Fifth Amendment to the United States Constitution of the plaintiffs and the members of their class, it is further ORDERED that the op-

eration or enforcement of 42 U.S.C. §607 by the defendant, Joseph Califano, Secretary of the U.S. Department of Health, Education and Welfare, is enjoined insofar as it prohibits defendant Califano from approving a Massachusetts plan or federal matching funds for Massachusetts to pay AFDC or Medicaid benefits to families deprived of support or care due to the unemployment of the mother.

Because the Court also finds that the Massachusetts regulations, 6 CHSR III, Subch. A, Pt. 301, §301.03, Subpt. A, §§ 303.01 & 303.04, are unconstitutional insofar as they make ineligible for AFDC and derivatively Medicaid benefits, families with children deprived of support or care because of the unemployment of the mother, while providing such benefits to families with children deprived of support because of the unemployment of the father in violation of the rights of the plaintiffs and the members of their class to equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution, it is hereby ORDERED that the operation or enforcement of the Massachusetts regulations, 6 CHSR III, Subch. A, Pt. 301, § 301.03; Pt. 303, Subpt. A, §§ 303.01 & 303.04, by the defendant, Alexander Sharp, Commissioner of the Massachusetts Department of Public Welfare, is enjoined insofar as it prohibits defendant Sharp from granting AFDC and Medicaid to families with children deprived of support or care because of the unemployment of the mother; and that defendant Sharp is enjoined from refusing to grant AFDC and Medicaid benefits to families with children deprived of support or care because of the unemployment of the mother in the same amounts and under the same standards as he provides such benefits

to families with children deprived of support or care because of the unemployment of the father in accordance with the Massachusetts regulations, 6 CHSR III, Subch. A, Pt. 301, § 301.03; Pt. 303, Subpt. A, §§ 303.01 & 303.04.

As there remains an outstanding claim by the plaintiffs against the state defendant, the court asks the plaintiffs to inform the court, within thirty (30) days, how they intend to proceed with respect to the state constitutional claim.

FRANK H. FREEDMAN,
U.S. District Judge.

APPENDIX C

United States District Court, District of
Massachusetts

(Civil Action No. 77-222-F)

CINDY AND WILLIAM WESCOTT, ET AL., PLAINTIFFS
v.

JOSEPH A. CALIFANO, Jr., SECRETARY OF HEALTH,
EDUCATION, AND WELFARE, ET AL., DEFENDANTS

Notice of Appeal

Notice is hereby given that the federal defendant hereby appeals to the Supreme Court of the United States pursuant to 28 U.S.C. 1252 and 2101 from the Order of the District Court entered in this action on April 20, 1978.

Dated at Boston, Massachusetts, this 17th day of May, 1978.

JOSEPH A. CALIFANO, Jr.,
*Secretary of Health,
Education, and Welfare.*

EDWARD F. HARRINGTON,
United States Attorney.

By JUDITH HALE NORRIS,
Assistant U.S. Attorney.

(43A)

Certificate of Service

BOSTON, MASSACHUSETTS,

SUFFOLK, ss: *May 17, 1978.*

I, Judith Hale Norris, Assistant U.S. Attorney hereby certify that I have this day served foregoing Notice of Appeal by mailing a copy of the same in a franked, official envelope to:

Mary Mannix, Esquire
 NLSL Center on Social Welfare
 Policy and Law, Inc.
 95 Madison Ave. New York, NY 10016
 Kenneth Neiman, Esquire
 Western Massachusetts Legal Services
 247 Cabot Street
 Holyoke, MA 01040
 Paul Johnson, Esquire
 Assistant Attorney General
 2019 McCormack Building
 One Ashburton Place
 Boston, MA 02108

JUDITH HALE NORRIS,
Assistant U.S. Attorney.

APPENDIX D

Section 407 of the Social Security Act, 75 Stat. 75, as amended, 42 U.S.C. (1970 ed. and Supp. V) 607, provides:

(a) The term "dependent child" shall, notwithstanding section 606(a) of this title, include a needy child who meets the requirements of section 606(a)(2) of this title who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father, and who is living with any of the relatives specified in section 606(a)(1) of this title in a place of residence maintained by one or more of such relatives as his (or their) own home.

(b) The provisions of subsection (a) of this section shall be applicable to a State if the State's plan approved under section 602 of this title.

(1) requires the payment of aid to families with dependent children with respect to a dependent child as defined in subsection (a) of this section when—

(A) such child's father has not been employed (as determined in accordance with standards prescribed by the Secretary) for at least 30 days prior to the receipt of such aid,

(B) such father has not without good cause, within such period (of not less than 30 days) as may be prescribed by

the Secretary, refused a bona fide offer of employment or training for employment, and

(C) (i) such father has 6 or more quarters of work (as defined in subsection (d)(1) of this section) in any 13-calendar-quarter period ending within one year prior to the application for such aid or (ii) he received unemployment compensation under an unemployment compensation law of a State or of the United States, or he was qualified (within the meaning of subsection (d)(3) of this section) for unemployment compensation under the unemployment compensation law of the State, within one year prior to the application of such aid; and

(2) provides—

(A) for such assurances as will satisfy the Secretary that fathers of dependent children as defined in subsection (a) of this section will be certified to the Secretary of Labor as provided in section 602 (a)(19) of this title within thirty days after receipt of aid with respect to such children;

(B) for entering into cooperative arrangements with the State agency responsible for administering or supervising the administration of vocational education in the State, designed to assure maximum utilization of available public vocational education services and facilities in the State in order to encourage the retraining

of individuals capable of being retrained; and

(C) for the denial of aid to families with dependent children to any child or relative specified in subsection (a) of this section—

(i) if, and for so long as, such child's father is not currently registered with the public employment offices in the State, and

(ii) with respect to any week for which such child's father receives unemployment compensation under an unemployment compensation law of a State or of the United States.

(c) Notwithstanding any other provisions of this section, expenditures pursuant to this section shall be excluded from aid to families with dependent children (A) where such expenditures are made under the plan with respect to any dependent child as defined in subsection (a) of this section, (i) for any part of the 30-day period referred to in subparagraph (A) of subsection (b)(1) of this section, or (ii) for any period prior to the time when the father satisfies subparagraph (B) of such subsection, and (B) if, and for as long as, no action is taken (after the 30-day period referred to in subparagraph (A) of subsection (b)(2) of this section), under the program therein specified, to certify such father to the Secretary of Labor pursuant to section 602(a)(19) of this title.

(d) For purposes of this section—

(1) the term "quarter of work" with respect to any individual means a calendar

quarter in which such individual received earned income of not less than \$50 (or which is a "quarter of coverage" as defined in section 413(a)(2) of this title), or in which such individual participated in a community work and training program under section 609 of this title or any other work and training program subject to the limitations in section 609 of this title, or the work incentive program established under part C;

(2) the term "calendar quarter" means a period of 3 consecutive calendar months ending on March 31, June 30, September 30, or December 31; and

(3) an individual shall be deemed qualified for unemployment compensation under the State's unemployment compensation law if—

(A) he would have been eligible to receive such unemployment compensation upon filing application, or

(B) he performed work not covered under such law and such work, if it had been covered, would (together with any covered work he performed) have made him eligible to receive such unemployment compensation upon filing application.

FEB 1 1979

MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-437**JOSEPH A. CALIFANO, SECRETARY OF HEALTH,
EDUCATION AND WELFARE,***Appellant*

—v.—**CINDY WESTCOTT, ET AL.**

)**No. 78-689****ALEXANDER SHARP II, COMMISSIONER, MASSACHUSETTS
DEPARTMENT OF PUBLIC WELFARE,***Appellant*

—v.—**CINDY WESTCOTT, ET AL.**

**ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

**APPEALS DOCKETED SEPTEMBER 14, 1978
(No. 78-437) AND OCTOBER 23, 1978 (No. 78-689).
PROBABLE JURISDICTION NOTED DECEMBER 11, 1978.**

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-437

JOSEPH A. CALIFANO, SECRETARY OF HEALTH,
EDUCATION AND WELFARE,

Appellant

—v.—

CINDY WESTCOTT, ET AL.

No. 78-689

ALEXANDER SHARP II, COMMISSIONER, MASSACHUSETTS
DEPARTMENT OF PUBLIC WELFARE,

Appellant

—v.—

CINDY WESTCOTT, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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* The opinion and order of the district court, filed April 20, 1978, appear at J.S. App. (78-437) 1A-42A. Defendant Sharp's Motion to Clarify, Or Alternatively, to Amend the Court's Order of April 20, 1978 and the district court's order of August 9, 1978 denying that motion are reprinted at J.S. App. (78-689) 3a-11a and 13a-14a respectively.

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DOCKET ENTRIES

- Date
1977
- Jan. 24 Complaint FILED
- Feb. 10 Plaintiff's memorandum in support of motion for preliminary injunction FILED
- Feb. 10 Ps' motion for a preliminary injunction FILED
- Feb. 15 Federal Dft's opposition to Ps' motion for preliminary injunction, filed c/s.
- Feb. 28 Plaintiff's amended complaint filed cs
- Feb. 28 Stipulation of plaintiffs and defendant Sharp
- Mar. 17 Answer of Alexander E. Sharp II to amended complaint FILED CS.
- Apr. 21 Answer of Federal defendant to amended complaint, FILED. cs.
- June 8 Ps' motion for partial summary judgment FILED CS
- June 8 Affidavit of Cindy and William Westcott FILED CS
- June 8 Affidavit of Susan and John Westwood FILED CS.
- June 8 Plaintiffs' motion for a class action order FILED CS.
- June 8 Plaintiffs' memorandum in support of motion for partial summary judgment FILED CS.
- June 22 Deft Sharp's notice of opposition pursuant to Local Rule 12(a) (2) to plaintiffs' motion for partial summary judgment FILED CS.
- June 22 Deft Sharp's notice of opposition pursuant to Local Rule 12(a) (2) to plaintiffs' motion for a class action order FILED CS.
- Aug. 4 Points and authorities in opposition to plaintiffs' motion for a class action order FILED CS

Date

1977

Aug. 24 Cross-motion for summary judgment, FILED. cs.
(Federal deft)

Points and authorities in opposition to pltfs' motion for partial summary judgment and in support of deft's cross-motion for summary judgment, FILED. cs.

Sep. 13 Stipulation of Ps and deft. Sharp. FILED

Oct 21 Deft Sharps' memorandum in support of his opposition to plaintiffs' motion for partial summary judgment
FILED CS

Dec 29 FREEDMAN, J. Hearing on cross motions for summary judgment; arguments; 30 days to file Finding of stipulated facts and class action issue; TAKEN UNDER ADVISEMENT. Motion for leave to allow Mary R. Manix to appear and practice before this court, filed and allowed.

1978

Jan 27 Defts' memorandum filed cs.

Jan 30 Stipulation filed

Jan 30 Ps' proposed findings with respect to the Class
FILED CS

Jan 30 Ps' memorandum in support of plaintiffs' proposed findings with respect to the class and in response to defts' opposition to class certification FILED CS

Mar 8 Ps' supplemental memorandum in support of pltfs' proposed findings with respect to the class and in response to defts' opposition to class certification FILED CS

Apr 20 FREEDMAN, J. OPINION ENTERED. cc/cl, West,
MCAIR, Mass Lawyers

Date

1978

Apr 20 FREEDMAN, J. ORDER ENTERED. . . for the reasons stated in the opinion entered this date, the plaintiff's motion for summary judgment is granted . . . pltfs' motion for the case to proceed as a class action is also granted . . . it is also ordered that 42 USC Sec 607 is declared unconstitutional

May 15 Deft.'s Sharp, motion for a stay of the Court's order of Apr. 20, 1978, filed c/s.

May 15 Memo in support of Deft.'s motion for stay of order, filed. c/s

May 18 Notice of Appeal by Deft., filed. c/s.

May 23 P's opposition to deft Sharp's motion for a stay
FILED CS

May 31 FREEDMAN, J. ORDER ENTERED. . . on 5/15/78 state deft Sharp, requested a stay of this Court's order of April 20, 1978 pending implementation of deft Sharp's plan for compliance with that Order. This court believes that deft Sharp's request involves a reasonable period of time for the state deft to fully comply with the Order of April 20, 1978. The Court allows deft Sharp's motion for this Court to stay that portion of its order of April 20, 1978 . . . stay to remain in effect until Aug. 1, 1978 . . . the Court will look with disfavor upon any further motions in this action to extend the length of the stay. cc/cl

June 1 P's supplement to their opposition to deft Sharp's motion for a stay FILED CS

June 7 Deft Sharp's motion to clarify or alternatively to amend the Court's order of April 20, 1978 FILED CS.

June 7 Affidavit of Jenny Netzer in support of deft Sharp's motion to clarify or alternatively to amend the Court's order of April 20, 1978

June 16 Deft Sharp's memorandum in support of his motion to clarify or alternatively to amend the Court's order of April 20, 1978 FILED CS.

Date

1978

June 19 Deft Sharp's notice of the issuance of a regulation extending AFDC U Benefits to certain families in which the mother meets the sex neutral eligibility requirements of 42 U.[S.]C. Sec. 607 FILED CS.

June 19 Deft Sharp's notice of the issuance of a supplementary instruction concerning the identification of families potentially eligible for AFDC U Benefits under the court's order of April 20, 1978 filed cs.

June 19 Ps' opposition to deft Sharp's motion to clarify or alternatively to amend the Court's order of April 20, 1978 filed cs.

June 19 Deft Sharp's notice of appeal filed cs

June 23 Defendant Sharp's Notice of the submission to the United States Department HEW of a proposed amendment to Massachusetts State Plan, filed. CS.

June 27 Copies of Complaint, Opinion, Order and Notices of Appeals docket entries forwarded to the Supreme Court.

July 14 Pltfs' memorandum in opposition to deft Sharp's motion for an extension of the Court's stay and in further opposition to his motion to clarify or, alternatively to amend the court's order of April 20, 1978 FILED CS

July 14 Deft Sharp's supplemental memorandum in support of his motion for extension of the court's stay of its order of April 20, 1978 FILED CS.

Jul 7 Deft Sharp's motion for an extension of the Court's stay of its order of April 20, 1978, with respect to those families where one parent remains employed for 100 or more hours per month FILED CS

Jul 19 FREEDMAN, J. ORDER ENTERED . . . motion of state deft Sharp for extension of the Court's stay of its order of April 20, 1978 is hereby allowed . . . with respect to state deft's motion to clarify or modify Order of April 20, 1978, the Court hereby takes same under advisement. All parties are hereby given an additional ten days from this date to submit any further memoranda or supporting documents. The Court intends to rule on this motion at an early date. cc/cl

Date

1978

Jul 28 Deft Sharp's supplemental memorandum in support of his motion to clarify or alternatively to amend the Court's order of April 20, 1978 FILED CS.

Jul 31 Pltfs' notice of Massachusetts' Planned Action to terminate the Westcotts' AFDC-U and Medicaid because of Mr. Westcott's employment and HEW's reaction to the State's principal wage earner test FILED CS

Aug 2 Deft Sharp's reply to pltgs' notice of the response from the Regional Office of the U.S. Dept of HEW to the State Dept of Public Welfare submission of a draft plan incorporating the principal wage-earner test filed cs.

Aug 9 FREEDMAN, J. ORDER ENTERED . . . having considered the memoranda and relevant supporting papers submitted by parties, this Court hereby denies the motion of state deft Sharp to clarify or alternatively, to amend the Court's order of April 20, 1978. cc/cl

Aug 24 Deft Sharps notice of appeal filed CS

Aug 24 Deft Sharp's motion for an extension of the Court's stay of its order of April 20, 1978 with respect to those families where one parent remains employed for 100 or more hours per month during the pendency of his appeal FILED CS

Aug 24 Deft Sharp's memorandum in support of his motion for an extension of the Court's order of April 20, 1978 with respect to those families where one parent remains employed for 100 or more hours per month during the pendency of his appeal filed

Aug 24 Affidavit of Jenny Netzer in support of deft Sharp's motion for an extension of the Court's stay of its order of April 20, 1978 with respect to those families where one parent remains employed for 100 or more hours per month during the pendency of his appeal filed

Sept 8 Ps' opposition to deft Sharp's motion for a stay of the Court's April 20, 1978 order with respect to certain members of the class pending appeal FILED CS.

Date

1978

Sept 12 Deft Sharp's memorandum in reply to pltfs' opposition to his motion for an extension of the Court's stay of its order of April 20, 1978 during the pendency of his appeal from the Court's order of August 9, 1978 FILED CS

Sept 20 FREEDMAN, J. ORDER ENTERED this Court denies the motion of state deft Sharp for an extension of stay of Court's order of April 20, 1978 this Court grants deft Sharp's alternative motion for an extension of this Court's order of April 20, 1978 cc/cl

Oct 18 Deft Sharp requests and immediate ruling on this motion without an opportunity pursuant of Local Rul 11(c)—Deft Sharp's motion for a limited extension of the stay granted by the order of Sept 20, 1978

Oct 18 FREEDMAN, J. (by the Court, Karl Fagan, Dep Clk) re deft Sharp's motion for limited stay of order of Sept 20, 1978—DENIED. cc/cl

Oct 24 Motion of the deft Secretary of HEW to stay order of April 20, 1978 pending appeal to Supreme Court filed cs.

Oct 24 Memorandum in support of motion of the deft Secretary of Hew to stay order of April 20, 1978 pending appeal to Supreme Court filed

Nov 1 Pltfs' memorandum in opposition to HEW's motion for a stay of the Court's April 20, 1978 order pending appeal FILED CS.

Nov 20 FREEDMAN, J. Re motion of the deft Sec of HEW to stay order of April 20, 1978 pending appeal to Supreme Court—"DENIED" cc/cl

Dec 4 Deft Sharp's motion to clarify the order of September 20, 1978 FILED CS.

Dec 4 Deft Sharp's memorandum in support of his motion to clarify the order of September 20, 1978 FILED

Date

1978

Dec 6 FREEDMAN, J. ORDER ENTERED Deft Sharp's motion to clarify this Court's order of Sept 20, 1978 is hereby allowed. This Court's order of Sept 20, 1978 has extended the stay of this Court's order of April 20, 1978 with respect to those families where one parent remains employed for 100 or more hours per month, until 14 days after the U.S. Supreme Court or a single Justice thereof has ruled on deft Sharp's renewed application for a stay made Dec 4, 1978 pursuant to U.S. Supreme Court Rules 18(2) and 50(5). It is so ordered. cc/cl

Dec 5 FREEDMAN, J. Re Deft Sharp's motion to clarify the order of Sept 20, 1978—"Deft's motion to allow stay of until Supreme Court acts on its motion to reconsider on Dec 8, 1978 is allowed."

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 77-222F

WILLIAM AND CINDY WESTCOTT, PLAINTIFFS

v.

JOSEPH CALIFANO, *et al.*, DEFENDANTS

TO: Judith Hale Norris
Assistant United States Attorney
for the District of Massachusetts
U.S. Post Office and Federal Court Building
Boston, Mass. 02109

Steven A. Rusconi
Assistant Attorney General
State of Massachusetts
One Ashburton Place
Boston, Mass. 02108

Please take notice that, pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, the attached amended complaint herein will be filed as a matter of right with the Court. No responsive pleading has yet been served upon plaintiffs.

The amendments made by the amended complaint are as follows:

- (1) The caption is amended to add the names of Susan and John Westwood as plaintiffs to this action;
- (2) New paragraphs 5a, 18a-18h have been added, and paragraphs 2, 12 and 19 have been amended, in order to allege those facts pertinent to the addition of the new plaintiffs; and
- (3) Paragraphs 1, 2, 6, 8, 9, 12, 14, 19, 21-25, 28-31, and 33 are amended to clarify that the claims of the Westwoods and all members of the class over age 21 pertain to medicaid benefits as well as to AFDC-U benefits.

(4) Paragraph 15 is amended to reflect that Ms. Westcott is another month pregnant since the filing of the original complaint.

No other amendments have been made to the original complaint.

Dated: February 25, 1977

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UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

Civil Action No. 77-222F

WILLIAM AND CINDY WESTCOTT, individually and on behalf-of their unborn child; SUSAN and JOHN WESTWOOD; and all plaintiffs on behalf of all others similarly situated, PLAINTIFFS

v.

JOSEPH CALIFANO, Secretary, United States Department of Health, Education, and Welfare, and ALEXANDER SHARP, Commissioner of the Massachusetts Department of Public Welfare, DEFENDANTS

AMENDED COMPLAINT

I

PRELIMINARY STATEMENT

1. This is a case of sex discrimination. Plaintiffs challenge the federal and state Aid to Families with Dependent Children (AFDC) and Medical Assistance (Medicaid) programs under which assistance is provided to needy children in two-parent homes where the father is unemployed (called AFDC-U), but is denied to similarly situated needy children where the mother is unemployed. The result of this discrimination is to deprive needy unemployed mothers, their spouses, and their dependent children, of financial and medical assistance to meet the bare necessities of life.

2. Plaintiffs, individually, and on behalf of others similarly situated, seek declaratory and injunctive relief against the state defendant to require him to make available AFDC and Medicaid to families with children deprived of support because of the unemployment of their mother, and against the federal defendant to require him to approve and fund Massachusetts AFDC and

Medicaid plans which do not discriminate against families with an unemployed mother, on the ground that the denial of AFDC and Medicaid to two parent families with an unemployed mother denies plaintiffs their rights to equal protection of the laws as guaranteed by the Fourteenth and Fifth Amendments to the United States Constitution; and as to the state defendant on the ground that such denial of AFDC and Medicaid denies plaintiffs their rights to equality under the law as guaranteed by the Constitution of the Commonwealth of Massachusetts.

II

JURISDICTION

3. Jurisdiction over the federal defendant is conferred on this court by 28 U.S.C. § 1331. Jurisdiction over the state defendant is conferred on this court by 28 U.S.C. § 1343(3), (4), and 28 U.S.C. § 1331. The matter in controversy exceeds in value, exclusive of interests and costs, the sum of \$10,000.

4. This action is authorized by the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, the Civil Rights Act, 42 U.S.C. § 1983, and the Declaratory Judgment Act, 28 U.S.C. § 2201.

III

PLAINTIFFS

5. Plaintiffs Cindy and William Westcott are adult citizens of the United States who reside in Springfield, Massachusetts. Ms. Westcott is pregnant with their first child. They bring this action on their own behalf and on behalf of their unborn child. The Westcott family is ineligible for AFDC solely because Cindy Westcott is an unemployed mother rather than an unemployed father.

5a. Plaintiffs Susan and John Westwood are adult citizens of the United States who reside in Plainfield, Massachusetts. The Westwoods have one child, who will be two years old this coming April. Susan and John Westwood are ineligible for AFDC-U benefits and for

medical assistance coverage under medicaid solely because Susan Westwood is an unemployed mother rather than an unemployed father.

IV

CLASS ACTION

6. Plaintiffs bring this action on behalf of all persons similarly situated, pursuant to Rules 23(a) and (b)(2) of the Federal Rules of Civil Procedure. The members of the class similarly situated are those Massachusetts families with two parents in the home and with minor dependent children, born or unborn, who would otherwise be eligible for AFDC under Massachusetts' AFDC program, and hence medicaid as well, but for the sex discrimination in the federal statute and Massachusetts regulations, which provide for the granting of federally funded AFDC and Medicaid to families with children deprived of support because of the unemployment of their father, but not to families deprived of support because of the mother's unemployment.

7. The class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims of the representative party are typical of the claims of the class; and the representative party will fairly and adequately protect the interests of the class. The defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

V

DEFENDANTS

8. Joseph Califano is the Secretary of Health, Education, and Welfare, and as such is responsible for the federal administration of the AFDC and Medicaid programs, including the approval of AFDC and Medicaid plans submitted by the states and the authorization of

AFDC and Medicaid matching funds to states with approvable plans.

9. Alexander Sharp is the Commissioner of the Massachusetts Department of Public Welfare and as such is responsible for the state administration of the AFDC and Medicaid programs.

VI

FACTUAL ALLEGATIONS

10. The AFDC program is a joint federal-state effort under which the federal government reimburses the states on a percentage basis for the benefits paid to eligible families. 42 U.S.C. § 601 *et seq.* Massachusetts receives reimbursement from the federal government for 50% of its AFDC assistance costs.

11. Federal matching funds are only available under the AFDC program for state payments made to families with dependent children or unborn children, that is, needy born and unborn children deprived of support or care by reason of the death, continued absence from the home, or incapacity of either the mother or father, § 406 of the Social Security Act, 42 U.S.C. § 606, or by reason of the unemployment of the father, as defined by the Secretary of HEW, § 407 of the Social Security Act, 42 U.S.C. § 607. Federal financial participation is not available to the states for payments made to families with needy children deprived of support or care because of the unemployment of their mother.

12. Families who are eligible for AFDC may be provided medical assistance benefits under the joint federal-state Medicaid program, for which participating states also receive federal reimbursement, and for which Massachusetts receives 50% reimbursement, 42 U.S.C. § 1396d (a)(i), (ii). Families actually receiving AFDC must be provided such medicaid coverage. 42 U.S.C. § 1396a (a)(10). Families who are eligible to receive AFDC, but who do not wish to apply for such cash assistance, may be provided medicaid by any state, with federal reimbursement, if such state elects to include such families in the Medicaid program, 45 C.F.R. § 248.1(a)(1),

and Massachusetts has elected to do so. Mass. Public Assistance Policy Manual, Ch. 1, section F, subd. 2.a.

13. Massachusetts is one of the 28 states which have been induced by the substantial federal matching funds available under the Social Security Act to provide AFDC benefits to families with children deprived of support or care by reason of their father's unemployment, referred to generally as AFDC-U benefits. 6 CHSR III, Subch. A; § 301.8, Pt. 303, subpt. A, §§ 303.01, 303.4. (Ex. A). In calendar year 1975 Massachusetts paid \$18,141,684 in AFDC-U benefits, of which approximately 50% was authorized by the federal defendant to be reimbursed from federal funds.

14. On information and belief, Massachusetts has refused to provide AFDC benefits (and/or medicaid coverage) to needy families with children deprived of support or care because of the unemployment of their mother solely because no federal financial participation is available for such payments, but would provide AFDC payments and medicaid coverage to needy families deprived of the support of the mother because of her unemployment if the federal defendant would authorize federal financial participation in such payments.

15. Plaintiffs Cindy and William Wescott were married in August, 1976. Ms. Westcott is approximately five months pregnant with their first child.

16. Cindy Westcott, who is nineteen, left school in the fall of 1974, when she was in the twelfth grade. Since July 1972, Ms. Wescott has held a variety of jobs, including positions as a waitress, store clerk, and chambermaid. From May 1976 until November 1976, she was employed as a chambermaid at Howard Johnson's Motor Lodge in Springfield. In November 1976, Ms. Westcott, who is pregnant, left her job because that particular work had become too strenuous. Since then Ms. Westcott has been seeking suitable employment but has been unable to find work. She is currently willing to accept employment.

17. William Westcott, who is eighteen, left school at the age of sixteen, when he was in the ninth grade. Since leaving school two years ago, Mr. Westcott has been seeking employment to help support his family, but he

has been unable to find permanent employment, in part because of his lack of skills and education.

18. The Westcotts' only source of income since November 1976 has been from Mr. Westcott's occasional part-time jobs. Ms. Westcott is presently out of work. The Westcotts are behind in their rent, and they are unable to purchase the high nutrition foods and the clothing that Ms. Westcott should have because of her pregnancy. They desperately need the \$272.10 monthly AFDC benefits for which the Westcotts would otherwise be eligible.

18a. Plaintiffs Susan and John Westwood were married August 1971. Plaintiffs have one child and are planning to have a second child.

18b. Susan Westwood works ten to fifteen hours per week at a medical facility in Worthington, Massachusetts, as a bookkeeper. She has worked at this job since approximately the fall of 1972, and presently earns \$71 per week and takes home \$66.56.

18c. Susan Westwood has been salaried at the rate indicated in paragraph 18b for all of calendar year 1976 and up to the present date. Throughout 1975 her net weekly earnings were approximately \$50 per week.

18d. Susan Westwood is willing to register for any work or training programs and otherwise comply with any conditions of eligibility that may be necessary to qualify for AFDC-U.

18e. John Westwood is not currently employed. He takes care of the Westwood's son while his wife is working. In addition, in order to permit the family to live as self sufficiently as possible, John Westwood does work in and around their home, which he built by himself, such as cutting fire wood used to heat the home.

18f. John Westwood was employed for part of 1973 and 1974 when he did some maple sugaring and logging. He earned approximately \$50 in January, \$100 in February, \$150 in March, \$100 in April and \$75 in May of 1974, and about \$75 in each of March and April 1973. Mr. Westwood has not been otherwise employed at any other time from January 1, 1973 to the present.

18g. Susan and John Westwood applied for medicaid at the beginning of February. While they have not received a formal determination on their application, a legal services advocate for them was advised by the local welfare office that they are not eligible for medicaid. The Westwood child is eligible for medicaid for his own needs, however, because he is under 21.

18h. The Westwoods do not desire cash public assistance, despite their financial eligibility for AFDC, because they desire to remain as self-sufficient as possible. The Westwoods do wish to obtain medicaid coverage primarily because they hope to have a second child and need that coverage for adequate pre-natal care and hospital delivery. They are not eligible for general relief, and in any event, general relief medical care does not include hospital services.

19. Cindy Westcott, who is totally unemployed, and Susan Westwood, who works less than 100 hours per month, and all others similarly situated are "unemployed" for purposes of meeting the definition of "unemployed" under federal and state requirements to receive AFDC-U and Medicaid benefits, but they and other persons similarly situated are unable to obtain those benefits for their families since they are mothers (or expectant mothers) instead of fathers. Despite the fact that they are not working, William Westcott and John Westwood are not "unemployed" within the meaning of such federal and state requirements for the family's receipt of AFDC-U and/or medicaid benefits, since they do not have a sufficient prior work record. Others similarly situated to Mr. Westcott and Mr. Westwood fail to qualify as "unemployed" for the same and/or for other reasons.

20. Those members of the class similarly situated who are over age 21 have been denied medical assistance benefits under Medicaid solely because they are not eligible for AFDC benefits.

VII

FIRST CLAIM OF RELIEF

21. As described in paragraphs 11 and 12, under § 407 of the Social Security Act, 42 U.S.C. § 607, federal matching payments may be authorized by the federal defendant towards the cost of AFDC payments made to families with children deprived of support or care by reason of their father's unemployment, and thus under § 1905 of the Act, 42 U.S.C. § 1396d, are authorized towards the cost of medical care for such families, but such federal financial participation may not be authorized towards the cost of any payments or care to or on behalf of families with children deprived of support or care because of the mother's unemployment.

22. Because § 407 (and derivatively § 1905) permits the federal defendant to authorize federal reimbursement for payments to or on behalf of families with an unemployed father, and prohibits him from authorizing the same reimbursement for payments to or on behalf of families with an unemployed mother, the federal defendant has made available to Massachusetts AFDC-U and Medicaid programs which invidiously discriminate on the basis of sex, and has discouraged Massachusetts from adopting a plan to pay equal benefits to two parent families with an unemployed mother. The federal defendant has thereby caused such families to be denied AFDC and Medicaid benefits.

23. The distinction drawn by § 407 (and derivatively by § 1905) between needy children in two parent families with unemployed mothers, who are not eligible to receive AFDC-U, and the parents of such children, who are not eligible to receive medicaid, on the one hand, and needy children and their parents in two-parent families with unemployed fathers, who are eligible for such benefits, on the other hand, is based solely on sex and is founded on an archaic and overbroad generalization not tolerated by the Constitution, namely, that in two-parent families only males provide financial support for the family. The result is to penalize those women who are family wage

earners, their spouses and their children by denying them AFDC and/or medicaid benefits for which they are otherwise eligible.

24. The classification established by § 407, which is based solely on the sex of the unemployed parent, is arbitrary and irrational, and bears no fair and substantial relation to the purpose of the AFDC or medicaid programs, which is to provide federally-funded assistance to needy children deprived of parental support or care, and their parents, and thus denies plaintiffs and others similarly situated their rights to equal protection of the laws as guaranteed by the Fifth Amendment to the Constitution of the United States.

VII

SECOND CLAIM FOR RELIEF

25. As described in paragraph 13, under Massachusetts welfare regulations, 6 CHSR III, Subch. A., § 301.3; Pt. 303, Subpt. A, §§ 303.01, 303.04, AFDC benefits (and thus medicaid benefits) are made available by the state defendant to families with children deprived of support or care by reason of their father's unemployment, but are not made available by him to families with children deprived of support or care because of the mother's unemployment.

26. For the same reasons set forth in paragraphs 23 and 24 with respect to § 407 of the Social Security Act, the state welfare regulations deny plaintiffs and others similarly situated their right to equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

IX

THIRD CLAIM FOR RELIEF

27. Article No. 106, Amendment to the Constitution of the Commonwealth of Massachusetts provides that "[e]quality under the law shall not be denied or abridged because of sex"

28. As described in paragraph 13, under Massachusetts welfare regulations, 6 CHSR III, Subch. A; § 301.03, Pt. 303, Subpt. A, §§ 303.01, and 303.04, AFDC-U benefits (and thus medicaid benefits) shall be paid to families with children deprived of support or care because of the unemployment of their fathers, but may not be paid to families with children deprived of support or care because of the unemployment of the mother. This classification discriminates against families with an unemployed mother solely on the basis of the sex of the unemployed parent.

29. By denying AFDC-U and Medicaid to plaintiffs and similarly situated persons solely on the basis of sex, the state of defendant has violated plaintiffs' right to equality under the law as guaranteed by Article No. 106, Amendment to the Constitution of the Commonwealth of Massachusetts.

X

PRAYER FOR RELIEF

Wherefore plaintiffs pray the court to:

30. Declare that 6 CHSR III, Subch. A; § 301.03, Pt. 303, Subpt. A, §§ 303.01, and 303.04 are unconstitutional insofar as they make ineligible for AFDC, and consequently for medicaid, families with children deprived of support or care because of the unemployment of their mother, while providing such benefits to families with children deprived of support because of the unemployment of their father, in violation of the plaintiffs rights to equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States and Article No. 106, Amendment to the Constitution of the Commonwealth of Massachusetts; and

31. Enjoin the operation or enforcement of these state welfare regulations insofar as they prohibit defendant Sharp from granting AFDC and Medicaid to families with children deprived of support or care because of the unemployment of their mother, and order defendant Sharp to pay aid to such families or to medical providers on their behalf in the same amounts and under the same standards as he pays aid to families with children de-

prived of support or care because of the unemployment of their father; and

32. Declare that § 407 of the Social Security Act, 42 U.S.C. § 607, is unconstitutional because it establishes a classification which discriminates against families with children deprived of support or care because of the unemployment of their mother, solely on the basis of sex, in violation of plaintiffs' Equal Protection rights under the Due Process Clause of the Fifth Amendment to the United States Constitution; and

33. Enjoin defendant Califano to approve any plan which may be submitted by defendant Sharp in connection with an order of this court pursuant to ¶ 31 supra; order defendant Califano to approve federal matching funds for any such plan submitted by Massachusetts; and enjoin the operation or enforcement of § 407 of the Act by defendant Califano insofar as it prohibits him from approving a Massachusetts plan or matching funds for Massachusetts to pay AFDC and Medicaid to families with children deprived of support or care because of the unemployment of their mother; and

34. Pursuant to Rule 54(d) of the Federal Rules of Civil Procedure, allow plaintiffs their cost herein, including attorneys fees, and also grant such additional and alternative relief as may be just and equitable under the circumstances.

Dated: February 25, 1977

Respectfully submitted,

WILLIAM A. BREITBART
Western Massachusetts Legal
Services, Inc.
121 Chestnut Street
Springfield, Mass. 01103
(413) 781-7814

KENNETH NEIMAN
Western Massachusetts Legal
Services, Inc.
247 Cabot Street
Holyoke, Mass. 01040
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MARY R. MANNIX
STEVEN J. COLE
Center on Social Welfare
Policy and Law, Inc.
95 Madison Avenue
New York, NY 10016
(212) 679-3709

EXHIBIT A

(6 CHSR III)

MASSACHUSETTS ASSISTANCE
PAYMENTS MANUALPart 301
Section 301.01

Subchapter A

AID TO FAMILIES WITH
DEPENDENT CHILDREN

General Information

301.03 *Dependent Child*

A Dependent Child is a needy child who has been deprived of parental support or care by reason of the death, continued absence from the home, physical or mental incapacity, or the unemployment of a father, and who is living with his or her father, mother or other parent in a place of residence maintained by one or more of such relatives as his or their own home and who is under the age of eighteen (18) or under the age of twenty-one (21) and a student regularly attending school, college, or university or regularly attending a course of vocational or technical training designed to fit him for gainful employment.

(6 CHSR III)

8/76

Massachusetts Assistance Payments Manual

Subchapter A

AID TO FAMILIES WITH
DEPENDENT CHILDREN

Eligibility Requirements	Part 303
Initial Eligibility	Subpart A
	Section 303.01

303.01 *Deprivation of Parental Support*

A child must be deprived of parental support due to the death, physical or mental incapacity, continued absence from the home of either parent, or unemployment of the father. Continued absence from the home includes commitment to a penal institution, desertion, divorce, annulment, separation, service in the Armed Forces or illegitimacy.

(6 CHSR III)

Rev. 2/77

Massachusetts Assistance Payments Manual

Subchapter A

AID TO FAMILIES WITH
DEPENDENT CHILDREN

Eligibility Requirements	Part 303
Initial Eligibility	Subpart A
	Section 303.04

303.04 *Unemployed Father*

AFDC is available to a child (ren) deprived of parental support because of the unemployment of the natural or adoptive father with whom (s)he resides provided the father meets the following conditions:

- I. Is currently unemployed (or is employed less than 100 hours a month) and has been unemployed (or was employed less than 100 hours) for at least 30 days prior to the receipt of AFDC.

A father who has worked a total number of hours that is less than 100 hours in the 30 day period prior to AFDC-UF eligibility meets the standard regardless of whether or not he may have been employed full time at some point during this 30 day period. For example, a father might have two weeks of full time employment (amounting to 80 hours) and then two weeks of total unemployment (amounting to zero hours), and the total hours worked would be less than 100.

The standard of 100 hours a month may be exceeded for a particular month if his work is intermittent and the excess is of a temporary nature as evidenced by the fact that he was under the 100-hour standard for the two (2) prior months and is expected to be under the standard during the next month.

NOTE: Date of eligibility for AFDC will be the thirty-first day of unemployment or underemployment.

- II. Has applied for any unemployment compensation (UC) benefits to which he may be entitled. The UC benefits when received must be deducted from the AFDC grant. (See Section 303.58 regarding retroactive UC benefits)
- III. Has not refused without good cause a bona fide offer of suitable employment or training for employment within thirty (30) days prior to eligibility for AFDC-UF.

Before it is determined that a father has refused a bona fide offer of employment or training for employment without good cause, the worker must first make a determination that such an offer was actually made.

When a job is a bona fide offer made directly by an employer, the determination of good cause is to be made by the worker. In making this determination, the worker shall give consideration to such factors as the ability and physical capacity of the individual to do the job; transportation problems to and from the job; applicable minimum wages; risks to health, safety or lack of workmen's compensation protection or other factors that would make refusing a job reasonable.

The determination as to whether an offer was bona fide or whether there was good cause to refuse an offer made through DES will be made by that agency.

Trans. by S.L. 407

Massachusetts Assistance Payments Manual

Subchapter A

AID TO FAMILIES WITH DEPENDENT CHILDREN

Eligibility Requirements	Part	303
Initial Eligibility	Subpart	A
(Cont.) Section 303.04		

IV. Is registered with the WIN program.

(a) *Initial Registration*

WIN registration is verified by the applicant's WIN Referral and Registration form (WIN #1) signed by the DES/WIN interviewer.

(b) *Current Registration*

Registration for WIN services shall be current in ongoing AFDC-UP cases provided that the unemployed father has not been WIN De-registered.

V. The unemployed father must fall into one of the following categories in order to be eligible:

- (a) Has six or more quarters of work in which he received earnings of not less than \$50.00 in each quarter, or participated in a community work and training program or under the Work Incentive Program in any 13 calendar-quarter period ending within one year prior to the application for AFDC; or
- (b) Received UC under an unemployment compensation law of any state or of the United States at sometime during the year prior to application for AFDC; or
- (c) Was qualified to receive UC under a UC law of any state or of the United States sometime during the year prior to application for AFDC but did not apply for UC; or

- (d) Performed work not covered by UC, which if covered would have created eligibility for UC within one year prior to the application for AFDC.

Trans. by S.L. 407

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

I, Steven J. Cole, being duly sworn, depose and say that I served copies of the foregoing Notice of Filing of an Amended Complaint and Amended Complaint upon defendants by causing copies of the same to be mailed to their attorneys as follows:

JUDITH HALE NORRIS
Assistant United States Attorney
for the District of Massachusetts
U.S. Post Office and Federal Court Building
Boston, Mass. 02109

Steven A. Rusconi
Assistant Attorney General
State of Massachusetts
One Ashburton Place
Boston, Mass. 02108

STEVEN J. COLE

Sworn to before me this 25th day of February, 1977

Notary Public

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 77-222-F

WILLIAM AND CINDY WESTCOTT, PLAINTIFFS

vs.

JOSEPH CALIFANO, JR., ET AL., DEFENDANTS

STIPULATION OF PLAINTIFFS AND
DEFENDANT SHARP

1. Plaintiffs' application for AFDC filed in November, 1976 will be reconsidered under the following conditions:
 - a. Plaintiffs' eligibility for AFDC-U will be determined with reference to all eligibility criteria thereof, excepting the requirement that the unemployed parent be a father, namely that Cindy Westcott's work history is to be considered in determining eligibility;
 - b. Alternatively, plaintiffs' eligibility for AFDC will be considered with reference to eligibility criteria regarding whether or not Cindy Westcott meets the definition of an incapacitated parent.
2. If eligibility is found under paragraph 1, assistance will be granted as of the date of plaintiffs' November application and continued pending judgment by this Court subject to further agreement of parties hereto.

/s/ Steven Rusconi/WAB
Attorney for defendant Sharp

/s/ William A. Breitbart
Attorney for plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 77-222-F

WILLIAM AND CINDY WESTCOTT, PLAINTIFFS

v.

JOSEPH CALIFANO, ET AL., DEFENDANTS

ANSWER OF ALEXANDER E. SHARP, II
TO AMENDED COMPLAINT

Alexander E. Sharp, II, defendant in the above entitled action, hereby answers the various allegations of the complaint as follows:

1. The allegations contained in paragraphs 1 and 2 are statements of the nature of the case and therefore require no answer.
2. The allegations contained in paragraphs 3 and 4 are statements relating to jurisdiction which require no answer.
3. The allegations contained in the first two sentences of paragraph 5 and 5a are admitted. The defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the last sentences of paragraphs 5 and 5a.
4. The allegations contained in paragraphs 6 and 7 are conclusions of law which require no answer. If called upon to respond, the defendant would deny the same.
5. The allegations contained in paragraphs 8 and 9 are admitted.
6. The allegations contained in paragraphs 10 through 13 to the extent they are allegations of fact are admitted and to the extent they are conclusions of law they require no answer.
7. The allegations contained in paragraph 14 are denied.

8. The allegations contained in paragraph 15 are admitted.

9. The defendant is without knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 16 through 20.

10. The allegations contained in paragraph 21 to the extent they are allegations of fact are admitted and to the extent they are conclusions of law they require no answer.

11. To the extent that paragraphs 22 through 24 contain allegations of fact, they are denied and to the extent they contain allegations of law, they require no answer.

12. The allegations contained in paragraph 25 are admitted.

13. To the extent that paragraph 26 contains allegations of fact, they are denied and to the extent it contains allegations of law, they require no answer.

14. The allegations contained in paragraphs 27 through 29 are conclusions of law which require no answer.

FIRST DEFENSE

15. The Court should dismiss the action for failure to state a claim upon which relief can be granted. Specifically, the program administered under Section 407 of the Social Security Act, 42 U.S.C., § 607, does not unconstitutionally discriminate on the basis of sex and is therefore valid. Also, to the extent complaint alleges a claim for relief under Amendment Article No. 106 of the Constitution of the Commonwealth of Massachusetts, the action is barred by the Supremacy Clause of the United States Constitution.

SECOND DEFENSE

16. To the extent that the claim of Susan and John Westwood is based upon the allegations to the effect that they hope to have a second child and need coverage for adequate pre-natal care and hospital delivery as contained in paragraph 18h of the complaint, there is no

actual case or controversy before the court and it should be dismissed for lack of subject matter jurisdiction.

THIRD DEFENSE

17. The defendant requests this Court to refuse to exercise its judicial power of pendent jurisdiction. Amendment Article No. 106 of the Massachusetts Constitution is a recent addition to the law of the Commonwealth and its application in this instance should be left to be resolved by the Courts of the Commonwealth.

WHEREFORE, defendants pray this Court to:

18. Dismiss the portion of the complaint which alleges a claim for relief under Amendment Article No. 106 of the Constitution of the Commonwealth.

19. Dismiss the portion of the complaint concerning Susan and John Westwood which is based upon the allegation to the effect that they hope to have a second child and need certain medical coverage as contained in paragraph 18 of the complaint.

20. Declare Section 407 of the Social Security Act, 42 U.S.C. § 607 and the program administered thereunder constitutional and thereafter dismiss the complaint.

By his Attorney

/s/

STEVEN A. RUSCONI
Assistant Attorney General
1 Ashburton Place, 20th Fl.
Boston, Massachusetts 02108
Tel. No.: 727 1001

DATED: 3/16/77

CERTIFICATE OF SERVICE

I, Steven A. Rusconi, Assistant Attorney General, hereby swear under the pain and penalties of perjury, that I have served a copy of the within Answer To Amended Complaint by mailing same, via first class mail, postage prepaid, to William A. Breitbart, Western Mass. Legal Services, Inc., 121 Chestnut Street, Springfield, Massachusetts 01103 and Judith Hale Norris, Assistant United States Attorney for the District of Massachusetts, U.S. Post Office and Federal Court Building, Boston, Mass. 02109 on the 16th day of March, Nineteen Hundred and Seventy Six.

/s/ _____

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 77-222-F

WILLIAM AND CINDY WESCOTT, PLAINTIFFS

v.

JOSEPH CALIFANO, JR., ET AL., DEFENDANTS

ANSWER TO FEDERAL DEFENDANT
TO AMENDED COMPLAINT

The federal defendant hereby answers the allegations of the Complaint as follows:

1. Paragraphs 1 and 2 contain plaintiffs' characterization of the action and conclusions of law, and therefore, require no response; however, insofar as answers may be required, defendant denies each and every allegation of fact and conclusion of law contained in paragraphs 1 and 2.
2. The allegations contained in paragraphs 3 and 4 contain conclusions of law, and therefore, require no response; however, insofar as answers may be required, defendant denies each and every allegation contained in paragraphs 3 and 4.
3. Defendant is without sufficient knowledge or information upon which to form a belief as to the truth or accuracy of the allegations contained in paragraphs 5 and 5a; and upon this basis denies the allegations therein.
4. The allegations contained in paragraphs 6 and 7 contain plaintiffs' characterization of the action and conclusions of law, and therefore, require no response; however, insofar as answers may be required, defendant denies each and every allegation of fact and conclusion of law contained in paragraphs 6 and 7.

5. Defendant admits paragraph 3 except to clarify that the Federal administration of the AFDC and Medicaid programs includes authorization of AFDC and Medicaid matching funds to States which have made expenditures in accordance with approved State plans.

6. Defendant admits paragraph 9.

7. Defendant admits allegations contained in paragraph 10.

8. With respect to paragraph 11, defendant admits that Federal financial participation is not presently available to States for AFDC payments made to families with children deprived of parental support or care solely because of the mother's unemployment. Defendant neither admits nor denies the remainder of paragraph 11, the allegations therein being conclusions of law which require no answer, but states that Federal matching funds are available under the AFDC program for State payments to or on behalf of families with dependent children to the extent provided in 42 U.S.C. §§ 606 and 607.

9. Defendant admits the allegations contained in paragraph 12, but refers the Court to the applicable statutory provisions at 42 U.S.C. §§ 1396a(a)(10) and 1396d(a)(i) and (ii), and to the regulations at 45 C.F.R. § 248.1 for a full and accurate statement of their contents.

10. With respect to the first sentence of paragraph 13, defendant admits that as of September 1976 there were 28 States, including Massachusetts, having approved State plans providing AFDC-UF benefits. Defendant admits the allegations contained in the last sentence of paragraph 13, but avers that he is without sufficient knowledge or information upon which to form a belief as to the exact amount of AFDC-UF benefits paid by Massachusetts in calendar year 1975.

11. Defendant is without sufficient information or knowledge upon which to form a belief as to the truth or accuracy of the allegations contained in paragraphs 14 through 20; and upon this basis denies each and every allegation of fact and conclusion of law contained in paragraphs 14 through 20.

12. Paragraphs 21 through 24 contain conclusions of law, and therefore, require no response; however, insofar as answers may be required, defendant denies each and every allegation of fact and conclusion of law contained in paragraphs 21 through 24, except defendant admits that federal matching funds under 42 U.S.C. § 607 are not provided for AFDC payments to families with children who are deprived of parental support or care solely because of the mother's unemployment.

13. Defendant neither admits nor denies paragraph 25, but refers the Court to the Massachusetts welfare regulations cited therein.

14. The allegations contained in paragraph 26 are conclusions of law, and therefore, require no response; however, insofar as an answer may be required, defendant denies paragraph 26.

15. The allegations contained in paragraph 27 through 29 are conclusions of law, and therefore, require no response; however, insofar as answers may be required, defendant denies each and every allegation of fact and conclusion of law contained in paragraphs 27 through 29.

JAMES N. GABRIEL
United States Attorney

By:

JUDITH HALE NORRIS
Assistant U.S. Attorney

OF COUNSEL:

SAMUEL C. FISH
Regional Attorney
Department of Health, Education and Welfare
Boston, MA 02203

CERTIFICATE OF SERVICE

Suffolk, ss.

Boston, Massachusetts
April 21, 1977

I, Judith Hale Norris, Assistant U.S. Attorney, hereby certify that I have this day served foregoing Answer of Federal Defendant To Amended Complaint by mailing a copy of the same in a franked, official envelope to:

Steven A. Rusconi
Assistant Attorney General
1 Ashburton Place
Boston, MA 02108

William Breitbart, Esquire
Western Mass. Legal Services, Inc.
121 Chestnut St.
Springfield, MA 01103

JUDITH HALE NORRIS
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 77-222-F

WILLIAM AND CINDY WESTCOTT, et al., PLAINTIFFS

v.

JOSEPH CALIFANO, JR., et al., DEFENDANTS

STIPULATION OF PLAINTIFFS AND
DEFENDANT SHARP

1. Plaintiffs Susan and John Westwood's application for Medicaid filed in or about February of 1977 and originally denied by letter dated March 2, 1977 will be reconsidered under the following conditions: said plaintiffs eligibility for Medicaid will be determined with reference to all eligibility criteria used to determine Medicaid eligibility of families who are eligible for AFDC-U but who do not wish to apply for such AFDC-U assistance, excepting the requirement that the unemployed parent be a male; accordingly, Susan Westwood's work history is to be considered in determining eligibility;
2. If eligibility is found under paragraph 1, Medicaid coverage will be granted as of the date of plaintiffs' application and continued pending judgment by this Court subject to further agreement of parties hereto.

/s/ Paul W. Johnson
Attorney for Defendant Sharp
9/12/77

/s/ Kenneth Neiman
Attorney for Plaintiffs
September 2, 1977

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 77-222-F

CINDY AND WILLIAM WESTCOTT, *et al.*, PLAINTIFFS

vs.

JOSEPH A. CALIFANO, *et al.*, DEFENDANTS

STIPULATION

Plaintiffs and defendants, through their attorneys, stipulate that the following paragraphs constitute the undisputed facts in this case.

1. Plaintiffs Cindy and William Westcott are married and reside in Springfield, Massachusetts with their infant son who was born on June 18, 1977.

2. Cindy Westcott, who is 20 years of age, has been employed at various full-time and part-time jobs since 1972. During July and August 1972 she earned net pay of about \$60 a week as a tobacco picker. During October and November 1973 she earned a total of about \$175 through a part-time job at a motel. From July to September 1974 she earned take-home pay of about \$30 a week doing general store work. From May 1975 until August 1975 she earned a total of about \$800 as a waitress. In September 1975 she earned a total of about \$50 as a waitress. From May 1976 until November 1976 she worked as a chambermaid at Howard Johnson's Motor Lodge in Springfield and received an average net pay of about \$50 per week.

3. William Westcott, who is 18, has an 8th grade education. His employment history consists of temporary odd jobs. During the early summer of 1976 he worked briefly unloading trucks and chopping trees. In December 1976 he obtained a part-time job unloading trucks which lasted only 3 weeks. He had a temporary CETA job during August and September 1976.

4. In November 1976 the Westcotts applied for public assistance at the Springfield Office of the Department of Public Welfare. They were denied AFDC-U benefits by a written notice dated November 26, 1976, which stated that William did not have enough quarters of work to satisfy the definition of an unemployed father as required by CHSR III-303 Subpart A, § 303.04. They were orally informed that they were ineligible for General Relief either as a family or individuals. On December 29, 1976 Cindy Westcott received a Medicaid card because she was eligible as a needy individual under 21.

5. After this lawsuit was filed, pursuant to a stipulation between the Westcotts' attorney and the attorney for the state defendant, the Westcotts' eligibility for AFDC was re-determined. Accordingly, the Department of Public Welfare determined in February 1977 that the Westcotts satisfied all conditions of eligibility for AFDC-U except the condition that the unemployed parent be male. Cindy Westcott, based on her work history was found to meet the definition of "unemployed" except for the fact that she is female. That Cindy Westcott meets the definition of unemployed was sufficient, pursuant to the stipulation, for the Westcotts to be granted AFDC-U. They were provided AFDC-U benefits retroactive to November 1976, and pursuant to the stipulation, they continue to receive AFDC-U benefits based on their continued eligibility but for the requirement that the unemployed parent be male.

6. Plaintiffs Susan and John Westwood are married and reside in Plainfield, Massachusetts with their son who was 2 years old in April, 1977.

7. Since 1972 Susan Westwood has worked part-time as a bookkeeper at Hiltown Medical Services. She works about 10-15 hours a week. From 1976 and continuing until the present Susan Westwood earns take home pay of approximately \$66 per week. During 1975 her net earnings were about \$50 a week. From approximately August 1973 until September 1975 she held another part-time job at the Family Planning Council of Western Massachusetts.

8. From January 1973 John Westwood's only employment has been maple sugaring for two months in 1973 and maple sugaring and logging for five months in 1974.

9. In February 1977 Susan and John Westwood applied for Medicaid benefits. By letters dated March 2, 1977 the Westwoods were denied Medicaid benefits because 1) neither was incapacitated so as to qualify them for MA-DA (Medicaid benefits for the disabled), and 2) John Westwood did not meet the definition of an unemployed father because of his insufficient work history. Their child receives Medicaid as a needy individual under 21.

10. In September 1977 the Westwoods' attorney and the state's attorney entered into a stipulation pursuant to which Massachusetts considered the Westwoods' eligibility for Medicaid benefits by applying all the Medicaid eligibility requirements for families who are eligible for AFDC-U except the requirement that the unemployed parent be male. By letter dated October 5, 1977, the Westwoods were notified by the Department of Public Welfare that they had been determined eligible to receive Medicaid. They are presently receiving only Medicaid based on their continuing eligibility but for the requirement that the unemployed parent be male.

Dated: New York, New York
January 27, 1978

Respectfully submitted,

/s/ Mary R. Mannix
MARY R. MANNIX
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and Law, Inc.
95 Madison Avenue
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/s/ Kenneth Neiman
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Attorneys for Plaintiffs
Assented to by telephone:
EDWARD F. HARRINGTON
United States Attorney

By: /s/ Judith Hale Norris
JUDITH HALE NORRIS
Asst. U.S. Attorney
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Attorney for Defendant Califano
Assented to by telephone:
FRANCIS X. BELLOTTI
Attorney General

By: /s/ Paul Johnson
PAUL JOHNSON
Asst. Attorney General
One Ashburton Place
Boston, MA 02108
(617) 727-1022
Attorney for Defendant Sharp

CERTIFICATE OF SERVICE

I, Mary R. Mannix, certify that on January 27, 1978, a copy of the foregoing Stipulation was served by mail on Judith Hale Norris, Asst. U.S. Attorney, John McCormack Post Office and Courthouse, Boston, MA. 02107, attorney for defendant Califano and on Paul Johnson, Asst. Attorney General, One Ashburton Place, Boston, MA. 02108, attorney for defendant Sharp.

MARY R. MANNIX

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 77-222-F

CINDY AND WILLIAM WESTCOTT, ET AL., PLAINTIFFS

v.

JOSEPH A. CALIFANO, ET AL., DEFENDANTS

DEFENDANT SHARP'S MOTION FOR A STAY OF
THE COURT'S ORDER OF APRIL 20, 1978,
PENDING IMPLEMENTATION OF DEFENDANT
SHARP'S PLAN FOR COMPLIANCE

Defendant Alexander Sharp II, Commissioner of the Department of Public Welfare of the Commonwealth of Massachusetts (Department), moves that the Court stay so much of its order of April 20, 1978, as enjoins him (1) from the operation or enforcement of 6 C.H.S.R. III, Subch. A, Pt. 301, § 301.3 and Pt. 303, Subpt. A, §§ 303.01 & 303.04 of the Massachusetts Assistance Payments Manual (AP Manual) insofar as these eligibility requirements prohibit him "from granting AFDC and Medicaid to families with children deprived of support or care because of the unemployment of the mother" and (2) "from refusing to grant AFDC and Medicaid benefits to families with children deprived of support or care because of the unemployment of the mother in the same amounts and under the same standards as he provides such benefits to families with children deprived of support or care because of the unemployment of the father in accordance with the Massachusetts regulations" pending implementation of the following plan for compliance.

In order to expedite the extension of AFDC-U benefits on a sex-neutral basis to those more needy households where the only employed parent has become unemployed, the Department has drafted a regulation. A copy of this regulation is attached as Appendix A. The regulation would extend eligibility for AFDC-U benefits to house-

holds where the mother meets the definition of unemployment and where the father is employed less than 100 hours per month. The Department will publish this proposed regulation on May 11, 1978, in accordance with the rule-making procedures established by Mass. G.L. c. 30A, § 3. The Department will have put the regulation into effect retroactively to April 20, 1978, in the field by June 15, 1978. On May 10, 1978, the Department transmitted an instruction to its field workers to record and identify those cases in which an application for AFDC-U benefits made by an intact (*i.e.*, two-parent) family has been denied on or after April 20, 1978. A copy of this instruction is attached as Appendix B. This instruction will ensure that the Department is able to provide AFDC-U benefits on a sex-neutral basis to all eligible applicants from April 20, 1978, forwards. In order to maintain federal financial participation in its expanded sex-neutral AFDC-U program pursuant to 42 U.S.C. § 603(a), the Department has submitted this proposed regulation to HEW for its consideration as an amendment to Massachusetts' State plan. A copy of the letter of May 9, 1978, from the Department to HEW in this regard is attached as Appendix C.

While the above-described regulation would cover those households where the only employed parent has become unemployed, defendant Sharp's plan for compliance must also address the more complicated status of households where both parents had been employed but one parent has become unemployed. The Department must determine whether only the unemployment of the primary wage-earner should make a household eligible for AFDC-U benefits or whether either parent's unemployment is sufficient to establish eligibility. The Department must also resolve questions arising from the interrelationship between an expanded sex-neutral AFDC-U program and other AFDC-related programs. One such question is which parent will be subject to the work registration requirement under the federally mandated Work Incentive Program (42 U.S.C. §§ 602(a)(19), 630-644 (Supp. III, 1977)). Defendant Sharp proposes the following schedule for development and implementation of a plan for com-

pliance with the Court's order with regard to applicant households where one parent continues to be employed. On June 1, 1978, the Department will (1) publish a regulation covering applicant households with an employed parent in accordance with the rule-making procedure established by Mass. G.L. c. 30A, § 3, (2) file the draft regulation with the Court, serving copies on all parties, and (3) submit the draft regulation to HEW for consideration as an amendment to Massachusetts' State plan. The Department will develop a final form of the regulation by July 8, 1978. The Department will print the final regulation and issue it to field workers by August 1, 1978. The regulation will be effective retroactively to April 20, 1978.

By his attorney,

/s/ Paul W. Johnson
PAUL W. JOHNSON
Assistant Attorney General
One Ashburton Place
Room 2019
Boston, MA 02108
(617) 727-1022

Dated: May 10, 1978

APPENDIX A

[SEAL]

ALEXANDER E. SHARP
Commissioner

THE COMMONWEALTH OF MASSACHUSETTS
 DEPARTMENT OF PUBLIC WELFARE
 600 Washington Street, Boston 02111

DRAFT

State Letter
 May 9, 1978

To: Department Staff
 From: ALEXANDER E. SHARP, Commissioner
 Re: *Westcott v. Califano and Sharp—AFDC—Unemployed Father*

The United States District Court for Massachusetts on April 20, 1978 ordered the Department to provide for the granting of AFDC and Medical Assistance to families with children who are deprived of support or care because of the unemployment of the mother.

This letter is an emergency interim regulation until full compliance with the Court's order can be achieved. When a family applying for AFDC or MA-AFDC is ineligible solely because the father does not qualify as an unemployed father for lack of the required quarters of work, the worker must determine whether the mother meets the conditions for "unemployed father" except for the fact that she is female. (Assistance Payments Manual Section 303.04). If she meets these conditions, the case is eligible for AFDC-UF or MA-AFDC.

The Department is developing a regulation which will fully comply with the Court's order. Until the regulation is issued, families with fathers who are employed 100 hours or more per month will continue to be ineligible for AFDC-UF.

APPENDIX B

[SEAL]

ALEXANDER E. SHARP
Commissioner

THE COMMONWEALTH OF MASSACHUSETTS
 DEPARTMENT OF PUBLIC WELFARE
 600 Washington Street, Boston 02111

AP-78-41
 Date: 5/10/78

To: Assistance Payments Staff
 From: ROBERT S. CASSIDY, Associate Commissioner for Field Operations; STEVE KANE, Assistant Commissioner for Assistance Payments
 Re: *Westcott v. Califano and Sharp—AFDC—Unemployed Father*

The United States District Court for Massachusetts on April 20, 1978 ordered the Department to provide for the granting of AFDC and Medical Assistance to families with children who are deprived of support or care because of the unemployment of the mother.

The Department is currently developing a policy to comply with the Court's order. Until regulations are promulgated, each office must clearly identify those cases in which an application for AFDC-UF made by an intact family has been denied on or after April 20, 1978.

The identification shall be made by writing the word "Westcott" in the disposition block of the Application Register (Form AP-1a).

MJM/kah

APPENDIX C

[SEAL]

ALEXANDER E. SHARP, II
Commissioner

THE COMMONWEALTH OF MASSACHUSETTS
 DEPARTMENT OF PUBLIC WELFARE
 600 Washington Street, Boston 02111

May 9, 1978

Charles C. Gentile
 Acting Assistant Regional Commissioner
 Office of Family Assistance
 U.S. Department of Health, Education and Welfare
 J. F. Kennedy Building
 Government Center
 Boston, Massachusetts 02203

Dear Mr. Gentile,

The United States District Court for Massachusetts on April 20, 1978 ordered the Department to provide for the granting of AFDC and Medical Assistance to families with children who are deprived of support and care because of the unemployment of the mother.

We are enclosing for your information a copy of a memorandum which announces the decision to our field offices, and a draft regulation which is being posted for public comment in accordance with Chapter 30A of the General Laws of Massachusetts. We would particularly welcome your reaction to the second document, which may lead to formal changes in our State Plan.

Sincerely,

/s/ Paul Provencher
 for Steve Kane
 Assistant Commissioner for
 Assistance Payments

PP/kah

UNITED STATES DISTRICT COURT
 DISTRICT OF MASSACHUSETTS

Civil Action No. 77-222-F

CINDY AND WILLIAM WESTCOTT, ET AL., PLAINTIFFS

v.

JOSEPH A. CALIFANO, ET AL., DEFENDANTS

AFFIDAVIT OF JENNY NETZER IN SUPPORT OF
 DEFENDANT SHARP'S MOTION TO CLARIFY OR,
 ALTERNATIVELY, TO AMEND THE COURT'S
 ORDER OF APRIL 20, 1978

I, Jenny Netzer, depose under oath that:

1. I am a budget analyst for the Department of Public Welfare (DPW) of the Commonwealth of Massachusetts.
2. I have read the Court's Orders of April 20, 1978, and May 31, 1978, in this action.

Estimated Additional Cost of an Expanded
 AFDC-U Program Where the Unemployment
 of Either Parent Would Establish a Family's
 Eligibility

3. For the reasons set forth in subsequent paragraphs, I estimate that, if DPW were to administer a sex-neutral AFDC-U program in which intact families were eligible to participate whenever either parent met the federal definition of unemployment, approximately 5,000 newly eligible families would have begun to receive AFDC benefits on the basis of this expanded AFDC-U program within one year after its initiation. As these newly eligible families would receive benefits for varying portions of the first year, the total additional cost of the expanded AFDC-U program for the first year would be approximately \$7,200,000. For subsequent years, the total additional annual cost of AFDC benefits for 5,000 families would be approximately \$14,400,000. I esti-

mate that 8,000 newly eligible families in total would be receiving AFDC benefits under such an expanded AFDC-U program within two or three years of its implementation. The total additional annual cost of AFDC benefits for these newly eligible recipient households would be approximately \$23,000,000. Since approximately 500 families out of the above-stated recipient population of 8,000 families are assumed to be currently receiving General Relief (GR), DPW's annual GR costs would thus decrease by approximately \$1,500,000 when these 500 families began to receive AFDC benefits. The above-estimated figures reflect the incremental cost which an extended sex-neutral program would impose upon the annual cost of the existing AFDC-U caseload prior to April 20, 1978.

Methodology Utilized in Estimating Cost of an Expanded AFDC-U Program

4. I derived the above-stated estimates by calculating the total number of families that would be eligible for AFDC benefits if income were the only test. I then decreased this number in order to allow for two factors: (1) there are other eligibility tests; (2) not all eligible families apply for and begin receiving AFDC benefits. Since different income tests are used in determining eligibility at intake and in redetermining the continuing eligibility of families that have been receiving AFDC, I used the two tests to derive two maximum numbers of income-eligible families. Under the initial eligibility income test, approximately 42,000 intact families would be eligible for AFDC; under the continuing income eligibility test, over 200,000 intact families would be eligible for AFDC. As families which have been found eligible for AFDC can retain their eligibility even when their income increases beyond the initial eligibility standard, the true number of eligible families would include some portion of those families whose income falls between the two income standards. Therefore, I worked first with the number of two-parent families with children whose countable income is below the initial eligibility AFDC standard. From this number, I subtracted two-parent

families which were eligible for AFDC benefits prior to April 20, 1978. These families would have been eligible on the basis of an unemployed father, an incapacitated parent, or a remarried mother. From the remainder, I then subtracted those two-parent families who, although income-eligible, would not actually apply for AFDC benefits. I next added in the number of families with income in excess of the initial eligibility standard but below the continuing eligibility standard that I estimated would have begun to receive AFDC benefits at a time when their income fell below the initial eligibility standard and would continue to do so despite a subsequent increase in income.

Detailed Description of Methodology of Estimating Cost

5. The estimate that 42,000 intact families with children meet the initial income eligibility test was calculated from demographic data for Massachusetts reported in a special 1975 U.S. Census Bureau survey entitled the Survey of Income and Education (SIE). A matrix of Massachusetts families with children by family size and income class was tabulated from the SIE. The number of AFDC income eligibles for each family size was determined by summing the families in each income class up to the income cut-off, the AFDC standards plus average work-related expenses for a family of that size. The 1975 data from the Survey of Income and Education is being used to reflect present conditions on the assumption that an upward income distribution shift between 1975 and 1978 is offset by growth in the number of intact families.

6. The estimate of 42,000 families with children meeting the initial income eligibility test includes an estimated 32,000 families which are currently eligible for AFDC benefits. The majority of these 32,000 families consists of families who were eligible for AFDC-U prior to April 20, 1978. On the basis of estimates made by the United States Department of Health, Education and Welfare (DHEW), I assume that the 5,800 families which were receiving benefits under AFDC-U prior to

April 20, 1978, represented 25% of the families eligible under the AFDC-U program. On this basis, I estimate that 23,000 out of the 42,000 income-eligible intact families were eligible for AFDC-U prior to April 20, 1978. I assumed that all eligible families with an incapacitated parent or a remarried mother are currently receiving AFDC benefits and that approximately 50% of the current AFDC cases involving remarried mothers would meet the initial income eligibility test. I, therefore, conclude that the population of 42,000 intact families which would meet the initial income eligibility test included 5,400 families with incapacitated parents and 3,700 families with remarried mothers.

7. I have assumed that half of the intact families newly eligible for AFDC as a result of the expanded AFDC-U program would actually begin receiving public assistance. This assumption was based on information on participation rates in the current AFDC program. Current participation in the Basic-AFDC program is about 95%, while the participation in the AFDC-U program is estimated by federal studies to be about 25%. The expanded AFDC-U program appears to allow a family to maintain eligibility when the parent initially qualifying as unemployed begins to work more than 100 hours per month if the other parent can then meet the federal definition of unemployment. Under these conditions, the expanded AFDC-U program would become a long-term income supplement for many families. As previously structured by federal statute and regulations, the AFDC-U program had operated largely to provide a short-term, last-resort source of financial support when a father was between jobs. The participation rate in the expanded AFDC-U program should thus be higher than it had been in the AFDC-U program prior to April 20, 1978.

8. For two reasons, I do not believe that newly eligible families will participate in the expanded AFDC-U program at the 95% rate at which eligible households participate in the Basic-AFDC program. First, many families find means of support other than through applying for AFDC benefits. Second, an undetermined number

of the 10,000 families (which comprise the difference between the total 42,000 income-eligible families and the 32,000 such families which were eligible for AFDC in any form prior to April 20, 1978) whose income would meet the initial AFDC eligibility test would in fact be ineligible because they had resources in excess of the AFDC assets limit, because the unemployed parent did not have the necessary work history, or because both parents were working more than the 100 hour limit. While the work history requirement in federal law would in all likelihood not disqualify many parents, I could find no information on which to base an estimate of its effect. I believe, however, that it is not unreasonable to assume that 50% of the new income-eligibles will qualify for and start receiving benefits by the end of the expanded AFDC-U program's first year.

9. Once they are receiving AFDC benefits, families can retain their income eligibility even when their income increases beyond the initial eligibility standard. Therefore, some portion of the approximately 160,000 families whose income falls between the initial eligibility and continuing eligibility income limits will actually receive AFDC benefits under the expanded AFDC-U program. In order to estimate this portion, I determined the proportion of one-parent families in each income class above the initial eligibility standard which are currently receiving AFDC benefits and applied this proportion to the number of two-parent families in the corresponding income class. The sum of the resulting figures for each income class was about 3,000 families. It is assumed that these families will not start receiving AFDC benefits until the second or third year of the expanded AFDC-U program's operation.

10. I have assumed that the average family which begins receiving AFDC benefits under the expanded AFDC-U program will receive a monthly payment of about \$240. This amount is what a family of four in which one parent was working full-time at the minimum wage would receive. If 5,000 of the newly eligible families were receiving AFDC benefits by the end of the first year following the AFDC-U program's expansion,

they would receive assistance for an estimated average of six months, for a total cost of \$7,200,000. The annualized cost of these additional 5,000 cases will be \$14,400,000. As to the long run, I assume that expansion of the AFDC-U program will add 8,000 families in all to the AFDC rolls and \$23,000,000 to annual AFDC costs.

11. I have assumed that all of the 500 families now receiving GR would be eligible for benefits under the expanded AFDC-U program. The annual cost of the GR program would accordingly decrease by \$1,500,000 if these families were to begin to receive AFDC benefits.

12. On the basis of federal financial participation at a 51.62% rate in the costs of an expanded AFDC-U program, the net cost to DPW of the expanded AFDC-U program would be approximately \$2,000,000 in the first year (at an annualized rate of \$5,500,000) and \$9,600,000 by the third year after its implementation.

13. I have developed the above-described estimate of the additional cost of an expanded AFDC-U program in conjunction with other budget analysts in DPW.

Estimated Incremental Cost of a Sex-Neutral AFDC-U Program Where Unemployment of the Family's Principal Wage-Earner is Prerequisite to Eligibility

14. I have estimated the incremental cost of a sex-neutral AFDC-U program which incorporated the eligibility requirement that the family's principal wage-earner be unemployed. In order to do so, I determined how many low-income two-parent families in which the mother had earned more than half the family's income would begin to receive AFDC benefits under the expanded AFDC-U program. I referred to national information developed by the United States Census Bureau for 1974 in its Current Population Survey. This information showed that the earning of wives contributed 50% or more to family income in 29% of two-parent families with an annual income less than \$7,000. I assumed that the new recipient population under an expanded AFDC-U program with a principal wage-earner

requirement would bear the same proportional relationship to the AFDC-U program's population prior to April 20, 1978, as families in which the mother is the principal wage-earner bear to families in which the father is the principal wage-earner, that is, 29% to 71% of all two-parent families with an annual income less than \$7,000. The resulting figure for the new recipient AFDC-U population under a principal wage-earner plan was 2,380. From this figure, however, I subtracted those families assumed to be already receiving AFDC benefits. These are families which receive AFDC benefits because the father is unemployed or incapacitated, although the mother is working. Since 15% of all families receiving AFDC benefits have earned income, I assumed that 15% of incapacity cases and 15% of current AFDC-U cases are included within the above-described 2,380 families. Therefore, I factored those incapacity and AFDC-U cases out of the 2,380 families. The resulting number of families which would begin to receive AFDC benefits under a sex-neutral AFDC-U program with a principal wage-earner requirement is 700. I assumed that these families would, on the average, receive the full AFDC grant for a family of four of \$395.50 per month. The total annual incremental cost of such a sex-neutral AFDC-U program would be \$3,300,000. As these families would receive AFDC benefits for varying portions of the first year, I assume that the total incremental cost for the first year would be \$1,650,000.

Estimated Total Annual Cost of the AFDC-U Caseload Prior to April 20, 1978

15. I estimate that the total annual cost of the existing AFDC-U caseload prior to April 20, 1978, was approximately \$30,000,000.

Signed,

/s/ Jenny Netzer
JENNY NETZER

DATED: June 7, 1978

Then appeared before me the above-named individual and swore that the statements contained in this affidavit are true to the best of her knowledge and belief.

/s/ Paul W. Johnson
 PAUL W. JOHNSON
 Notary Public
 My commission expires on
 July 21, 1983

[SEAL]
 ALEXANDER E. SHARP
 Commissioner

THE COMMONWEALTH OF MASSACHUSETTS
 DEPARTMENT OF PUBLIC WELFARE
 600 Washington Street, Boston 02111

June 14, 1978

Mr. Charles C. Gentile
 Acting Assistant Regional Commissioner
 Office of Family Assistance
 Department of Health, Education and
 Welfare
 John F. Kennedy Federal Building
 Government Center
 Boston, Massachusetts 02203

Dear Mr. Gentile:

The United States District Court for Massachusetts on April 20, 1978 in *Westcott vs. Califano and Sharp*, ordered the Massachusetts Department of Public Welfare to provide for the granting of AFDC and Medical Assistance to families with children who are deprived of support or care because of the unemployment of the parent. Previously, it applied only to unemployed fathers.

We are enclosing a copy of our State Letter 463, issued June 8, 1978 as an emergency interim regulation and retroactive to April 20, 1978 which mandates the court ruling. Applications for assistance made by an intact family denied on or after this date will be redetermined for eligibility.

Also enclosed is the draft of a new State Letter which will supercede emergency State Letter 463, making the court ruling permanent policy. It is expected that the draft will be placed in the required 21 day advertising period for public comment by June 15, 1978. After review, field issuance should be the middle of July.

The State Plan of Operations (Title IV-A) will be amended back to the date of the court ruling after promulgation of permanent change of policy (Attachment 2.4A, Unemployment of the Father).

In the meantime, based on the court ruling, we are amending the definition of *Unemployed Father* under Section 2.4. Enclosed is a draft of a new page (28A) to be added to the plan. A OPC-11 Transmittal Notice is being prepared.

In order to insure correctness and acceptance of the draft plan material, we would appreciate your review and comments as soon as possible.

Sincerely,

/s/ Steve Kane
STEVE KANE
Assistant Commissioner
Assistance Payments

JAS/lc

[SEAL]

ALEXANDER E. SHARP
Commissioner

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF PUBLIC WELFARE
600 Washington Street, Boston 02111

State Letter 463
June 8, 1978

TO: DEPARTMENT STAFF

FROM: ALEXANDER E. SHARP, COMMISSIONER

RE: WESTCOTT V. CALIFANO AND SHARP—AFDC—
UNEMPLOYED FATHER

The United States District Court for Massachusetts on April 20, 1978 ordered the Department to provide for the granting of AFDC and Medical Assistance to families with children who are deprived of support or care because of the unemployment of the mother.

This letter is an emergency interim regulation until full compliance with the Court's order can be achieved. When a family is ineligible for AFDC or MA-AFDC solely because the father does not qualify as an unemployed father for lack of the required quarters of work, the worker must determine whether the mother meets the conditions for "unemployed father" except for the fact that she is female. (Assistance Payments Manual Section 303.04). If she meets these conditions, the case is eligible for AFDC-UF or MA-AFDC.

AFDC-UF eligibility must be determined in accordance with the emergency interim regulation described above for all AFDC cases identified as "Westcott" on the Application Register under instructions in AP memo 78-41 dated May 10, 1978.

The CSAO/WSO must also review the MA/AFDC application register and redetermine eligibility for those cases

in which an application made by an intact family has been denied on or after April 20, 1978.

The Department is developing a regulation which will fully comply with the Court's order. Until the regulation is issued, families with fathers who are employed 100 hours or more per month will continue to be ineligible for AFDC-U or MA-AFDC.

This letter will remain as an active State Letter until manual pages can be issued to fully comply with the order of the court.

This letter is effective April 20, 1978.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 77-222-F

CINDY AND WILLIAM WESTCOTT, ET AL., PLAINTIFFS

v.

JOSEPH A. CALIFANO, ET AL., DEFENDANTS

DEFENDANT SHARP'S MOTION FOR AN EXTENSION OF THE COURT'S STAY OF ITS ORDER OF APRIL 20, 1978, WITH RESPECT TO THOSE FAMILIES WHERE ONE PARENT REMAINS EMPLOYED FOR 100 OR MORE HOURS PER MONTH

Defendant Alexander Sharp II, Commissioner of the Massachusetts Department of Public Welfare (Department), moves that the Court order that its stay of its Order of April 20, 1978, as set forth in its Order of May 31, 1978, be extended until October 1, 1978, with respect to the provision of benefits under the AFDC-U program (established by 42 U.S.C. § 607 and implemented by federal and state regulations) to those families where one parent remains employed within the definition of 45 C.F.R. § 233.100 (a)(1)(i), that is, for 100 or more hours per month. As to those families where both parents meet the federal definition of unemployment, the Department issued a regulation on June 8, 1978, which extended benefits under the AFDC-U program to such families retroactively to April 20, 1978, where either parent met or meets the program's sex-neutral

eligibility requirements. A memorandum in support of this motion has been filed and served herewith.

By his attorney,

/s/ Paul W. Johnson
 PAUL W. JOHNSON
 Assistant Attorney General
 One Ashburton Place
 Boston, MA 02108
 (617) 727-1022

Dated: July 7, 1978

APPENDIX A

July 11, 1978

Mr. Stephen Kane
 Assistant Commissioner for Assistance Payments
 Department of Public Welfare
 600 Washington Street
 Boston, Massachusetts 02111

Dear Mr. Kane:

This is in reply to your letter of June 14, 1978, with which you sent us, for review, a copy of a draft State Letter you proposed to issue to the field on the subject of the unemployed parent. This has been necessitated by the *Westcott v. Califano* and *Sharp* case. You requested our comments to assure correctness and acceptance of your revised State Plan.

Since the Court's Order of May 31, 1978 allowed your motion to stay extension of AFDC and Medicaid benefits to unemployed mothers until August 1, 1978, you have until that date to come into full compliance with the Court's Order of April 20, 1978. The May 31st Order also requires you to identify and keep records of all members of the plaintiff class who applied for AFDC-U or Medicaid after April 21, 1978, in order to be able to determine their eligibility for benefits and to pay such benefits as soon as the stay has expired.

The Court's Order of May 31, 1978 pointed out that the April 20th Order does *not* authorize the imposition of additional limitations on the awarding of AFDC-U or Medicaid benefits, including the primary wage earner limitation which you propose. While your motion of May 10, 1978 to clarify or amend the Court's Order has not been acted upon, our Regional Attorney believes that it is unlikely that the court will permit the adoption of a primary wage earner standard. Unless and until the court does so, we cannot assume that a primary wage earner standard is permissible.

Aside from the court action, our Regional Attorney doubts that HEW could approve a primary wage earner

standard of eligibility for AFDC-U benefits under the current statute (which has become sex-neutral as a result of litigation). This is based on the fact that while Congress, in enacting Section 407 of the Social Security Act, may have had in mind the idea of the breadwinner, in actual practice benefits under Section 407 have been provided to all unemployed fathers who meet the statutory and regulatory requirements, regardless of whether the father was actually the principal wage earner or not. Therefore, it is doubtful that, without specific legislation, HEW can take the position that the unemployed parent who is not the primary wage earner is ineligible for benefits. Our Regional Attorney is of the opinion that under the Court's two Orders, AFDC-U benefits must be extended to families in which the mother is unemployed on the same basis as they are granted to families with unemployed fathers.

Our Regional Attorney also points out that the Supreme Court in *Batterton v. Francis*, 97 S. Ct. 2399 (1977), emphasized that Congress expressly delegated to the Secretary the power to prescribe standards for determining what constitutes "unemployment" for purposes of AFDC-UF eligibility. The Secretary's regulations nowhere give states discretion to define unemployment in terms of a principal wage earner, nor more specifically in terms (as your proposed Section 303.01 provides) of the parent whose "earned income or unemployment compensation was greater during the six calendar months preceding the month of application, reapplication or redetermination of eligibility."

Section 303.04(D) of your proposed draft would appear to require WIN registration by the unemployed parent without exceptions. This is contrary to Section 507 of P.L. 94-566 which provides that the exemptions contained in Section 402(a)(19)(A) are applicable to unemployed fathers/parents who apply for benefits under Section 407. Thus, an unemployed father may be exempt from WIN registration as a relative caring for a child under six years of age under Section 402(a)(19)(A)(v). With regard to Section 402(a)(19)(A)(vi), in so far

as this exemption is sex discriminatory and has not been available to individuals receiving benefits under Section 407, our Regional Attorney believes HEW's position should be that this exemption is not now available to unemployed mothers seeking benefits under Section 407. In the *Westcott* case, plaintiff's attorney indicated that the same exemptions should be available to unemployed mothers as are now available to unemployed fathers. Therefore, with regard to WIN registration for unemployed mothers, our Central Office will have to resolve the problem before we can advise you about the acceptance of your proposed Section 303.04(D).

We hope this letter is helpful. We shall advise further as soon as we hear from our Central Office.

Sincerely yours,

CHARLES C. GENTILE
Acting Assistant Regional
Commissioner for Family
Assistance

SUPREME COURT OF THE UNITED STATES

Nos. 78-437 and 78-689

**JOSEPH A. CALIFANO, SECRETARY OF HEALTH,
EDUCATION AND WELFARE, APPELLANT**

v.

CINDY WESTCOTT, ET AL.; and

ALEXANDER SHARP, II, ETC., APPELLANTS

v.

CINDY WESTCOTT, ET AL.

**APPEALS from the United States District Court for
the District of Massachusetts.**

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and a total of one hour is allotted for oral argument.

December 11, 1978

FILED

NOV 15 1978

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL MODAK, JR., CLERK

OCTOBER TERM, 1978

No. 78 - 437

JOSEPH A. CALIFANO, Secretary of
Health, Education and Welfare,
Appellant,

v.

CINDY WESTCOTT, et al., Appellees

No. 78 - 689

ALEXANDER SHARP, II, Commissioner of
the Massachusetts Department of
Public Welfare, Appellant,

v.

CINDY WESTCOTT, et al., Appellees

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF
MASSACHUSETTS

MOTION FOR LEAVE TO PROCEED IN
FORMA PAUPERIS ON BEHALF OF
APPELLEES

Henry A. Freedman
Mary R. Mannix
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247 Cabot Street
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(413) 536-2420

Attorneys for Appellees

November 14, 1978

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78 - 437

JOSEPH A. CALIFANO, Secretary of
Health, Education and Welfare,
Appellant,

v.

CINDY WESTCOTT, et al., Appellees

No. 78 - 689

ALEXANDER SHARP, II, Commissioner of
the Massachusetts Department of
Public Welfare, Appellant,

v.

CINDY WESTCOTT, et al., Appellees

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF
MASSACHUSETTS

MOTION FOR LEAVE TO PROCEED IN
FORMA PAUPERIS

Appellees Cindy and William Westcott and Susan and John
Westwood ask leave to file the attached Motion to Affirm without
prepayment of costs and to proceed in forma pauperis pursuant to
Rule 53.

The appellees' affidavits in support of this motion are
attached hereto.

Dated: November 14, 1978

Respectfully submitted,

Henry A. Freedman
Mary R. Mannix
Center on Social Welfare
Policy and Law, Inc.
95 Madison Avenue
New York, NY 10016
(212) 679-3709

Kenneth P. Neiman
Western Massachusetts Legal
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247 Cabot Street
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(413) 536-2420

Attorneys for Appellees

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

JOSEPH A. CALIFANO, Secretary of Health,
Education and Welfare, et al.,

Appellants

v.

CINDY and WILLIAM WESTCOTT, et al.,

Appellees

AFFIDAVIT IN SUPPORT OF MOTION
FOR LEAVE TO PROCEED IN FORMA
PAUPERIS

We, Cindy and William Westcott, being first duly sworn according to law, depose and say, in support of our application for leave to proceed without being required to prepay costs or fees:

1. We are appellees in the above-entitled cause.
2. We are unable to pay the costs of said cause because of our family's poverty.
3. We are unable to give security for the same.
4. We believe we are entitled to the redress we seek in said cause.
5. The nature of said cause is briefly stated as follows:

We are the parents of one child and, at the time the above cause was filed in January, 1977, we were being denied Aid to Families with Dependent Children (AFDC) which, in pertinent part, provides benefits to families of needy children in two-parent homes where the father is unemployed (called AF-C-U), but is denied to similarly situated needy children and their families where the mother is unemployed. The United States District Court held that this sex-based discrimination between families, established by both federal and state law, violates equal protection

rights under both the Fifth and Fourteenth Amendments to the United States Constitution. The discrimination was found by the Court to deprive needy unemployed mothers, their spouses, and their dependent children of financial and medical assistance to meet the bare necessities of life.

Cindy Westcott
Cindy Westcott

William R. Westcott
William Westcott

Duly witnessed and sworn to before me, a Notary Public, this 26 day of October, 1978.

Richard J. Fink

Notary Public

My commission expires: July 8, 1979

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

RECEIVED

NOV 2 1978

CENTER ON SOCIAL
WELFARE POLICY & LAW
NEW YORK

JOSEPH A. CALIFANO, Secretary of Health,
Education and Welfare, et al.,

Appellants

v.

CINDY and WILLIAM WESTCOTT, et al.,

Appellees

AFFIDAVIT IN SUPPORT OF
MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

We, Susan and John Westwood, being first duly sworn according to law, depose and say, in support of our application for leave to proceed without being required to prepay costs or fees:

1. We are appellees in the above-entitled cause.
2. We are unable to pay the costs of said cause because of our family's poverty.
3. We are unable to give security for the same.
4. We believe we are entitled to the redress we seek in said cause.
5. The nature of said cause is briefly stated as follows:

We are the parents of two children and, at the time we entered the above cause in February, 1977, we were being denied Medical Assistance (Medicaid) which, in pertinent part, provides medical benefits to families of needy children in two-parent homes where the father is unemployed (called MA-AFDC-U related) but is denied

to similarly situated needy children and their families where the mother is unemployed. The United States District Court held that this sex-based discrimination between families, established by both federal and state law, violates equal protection rights under both the Fifth and Fourteenth Amendments to the United States Constitution. The discrimination was found by the Court to deprive needy unemployed mothers, their spouses, and their dependent children of financial and medical assistance to meet the basic necessities of life.

Susan Westwood
Susan Westwood

John Westwood
John Westwood

Duly witnessed and sworn to before me, a Notary Public, this 25th day of October, 1978.

Robert A. Corash
Notary Public

Robert A. Corash
Notary Public
My Commission Expires October 13, 1983
My Commission expires: _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78 - 437

JOSEPH A. CALIFANO, Secretary of
Health, Education and Welfare,
Appellant,

v.

CINDY WESTCOTT, et al., Appellees

No. 78 - 689

ALEXANDER SHARP, II, Commissioner of
the Massachusetts Department of
Public Welfare, Appellant,

v.

CINDY WESTCOTT, et al., Appellees

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF
MASSACHUSETTS

MOTION TO AFFIRM

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78 - 437

JOSEPH A. CALIFANO, Secretary of
Health, Education and Welfare,
Appellant,

v.

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No. 78 - 689

ALEXANDER SHARP, II, Commissioner of
the Massachusetts Department of
Public Welfare, Appellant,

v.

CINDY WESTCOTT, et al., Appellees

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF MASSACHUSETTS

MOTION TO AFFIRM

Appellees Cindy and William Westcott, and Susan and John Westwood, and the class they represent move the Court to affirm the decision below on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

QUESTIONS PRESENTED

1. Whether Section §407 of the Social Security Act which creates the Aid to Families with Dependent Children - Unemployed Fathers (AFDC-U) program violates the Due Process Clause of the Fifth

Amendment by authorizing payment of welfare benefits to needy two-parent families with children deprived of parental support or care because of the father's unemployment, but not to similarly situated families deprived because of the mother's unemployment.

2. If yes, whether the appropriate remedy is simply to eliminate the gender discrimination in the AFDC-U program or simultaneously to restructure the program by adding a principal wage earner test and thereby terminate benefits to some currently eligible families.

STATEMENT OF THE CASE

Aid to Families with Dependent Children (AFDC) is a federal-state program authorized by the Social Security Act, §401 et seq., 42 U.S.C. §601 et seq., under which states with an approved AFDC state plan receive federal matching funds for aid that is paid with respect to a "dependent child." Section 403 of the Social Security Act, 42 U.S.C. §603. The Act defines "dependent child" as a needy child deprived of parental support or care by reason of the death, absence, or incapacity of a parent, Section 406(a) of the Social Security Act, 42 U.S.C. §606(a), or, as is pertinent here, by reason of the unemployment of his father, Section 407 of the Social Security Act, 42 U.S.C. §607.* Section 407 sets out specific conditions which the unemployed father must meet, and also authorizes the Secretary to set the standards for defining "unemployment," found at 45 C.F.R. §233.100.

States which elect to participate in the original AFDC program under §406(a) need not participate in the AFDC-U program established under §407. However, as with the program established under §406(a), states which do elect to participate must comply with the requirements of the Act and federal regulations. Since a

* The Act also provides that AFDC payments include payments to meet the needs of the relative caring for the child, and in the case of children deprived of support because of the incapacity of a parent or the unemployment of a father, it includes payments to meet the needs of both parents. Section 406(b) of the Social Security Act, 42 U.S.C. §606(b).

dependent child is defined as one deprived of a father's unemployment, federal matching funds may not be provided for AFDC-U benefits to children deprived of parental support because of their mother's unemployment.

Families who receive AFDC-U benefits (or, at state option, who are eligible but who have not applied for cash assistance, 45 C.F.R. §248.1(a)(1)) are also entitled to medical assistance benefits under the federal-state Medicaid program, Section 1902(a) (10) of the Social Security Act, 42 U.S.C. §1396a(a)(10). The Social Security Act does not permit federal matching funds to be paid towards Medicaid benefits for needy children deprived of support or "care by reason of the unemployment of their mother, however.

Massachusetts has exercised its option under §407 to make AFDC-U payments and provide Medicaid coverage to families with children deprived of parental support because of the father's unemployment and receives 50% of the cost of its AFDC-U and Medicaid payments from the federal government.* Because federal funds are not available, the state does not provide AFDC-U or Medicaid benefits to families with children deprived of support because of their mother's unemployment.

This suit was filed after appellees were denied desperately needed AFDC-U and/or Medicaid benefits simply because the mother in each family rather than the father was the parent who was unemployed within the meaning of §407 and implementing regulations. The facts in the appellees' cases are as follows:

Cindy and William Westcott are married and reside with their infant son in Massachusetts. Cindy Westcott, age 19 when this suit was filed in January 1977, had been the family breadwinner

* See 6 CHSR III, Subch. A, Pt. 301, §301.03; pt. 303, subpt. A, §303.01, §303.04. The state has also opted to provide Medicaid to families who are eligible for AFDC but who have not applied for benefits. Mass. Public Assistance Policy Manual, Ch. I, Section F, Subd. 2a.

since her 1976 marriage to William Westcott. Her work history dating back to 1972 includes a variety of full-time and part-time jobs, in such positions as waitress and store clerk. Her most recent employment as a chambermaid ended in November 1976. William Westcott, age 19 when this suit was filed, has an 8th grade education. By the end of 1976, his minimal work history included only temporary odd jobs as unloading trucks, chopping trees, and a summer CETA job.

In November 1976 when they were without income the Westcotts applied for public assistance from the Massachusetts Department of Public Welfare but were denied AFDC-U for themselves and their unborn child because William Westcott did not have enough quarters of work to qualify as an unemployed father under the federal-state AFDC-U criteria. Cindy Westcott's status as an unemployed mother was irrelevant to the state's determination of their eligibility for AFDC-U.

Susan and John Westwood are married and presently reside in Massachusetts with their two children. Susan Westwood has worked part-time as a bookkeeper since 1972. When the Westwoods joined as plaintiffs in this suit, Susan Westwood was the family breadwinner. She was working 10-15 hours a week and had a weekly "take home" pay of \$66. John Westwood was unemployed and his only work history since 1972 was maple sugaring for two months in 1973 and maple sugaring and logging for nine months in 1974. In February 1977 the Westwoods applied for Medicaid because they wanted Medicaid coverage for medical care in connection with the birth of a second child. Although financially eligible for AFDC-U they decided to forego those benefits. They were denied because John Westwood did not have enough quarters of work to qualify as an unemployed father.

Appellees brought this action on behalf of themselves and the class of Massachusetts families who would otherwise be eligible for AFDC-U and Medicaid but for the gender discrimination in the federal statute and Massachusetts regulations. Appellees' complaint

alleged that the gender discrimination in the federal statute and state regulations violated the Due Process clause of the Fifth Amendment and the Equal Protection clause of the Fourteenth Amendment respectively and further that the gender discrimination in the state regulations violated the state constitution. After this suit began the plaintiffs' attorneys and attorney for the state appellant entered into stipulations whereby the Westcotts' eligibility for AFDC-U and the Westwoods' eligibility for Medicaid would be determined without respect to the requirement that the unemployed parent be male. Based on Cindy Westcott's and Susan Westwood's work histories, the Westcotts and Westwoods were found eligible and were provided benefits based on their continued eligibility pending resolution of their case.

On April 20, 1978 the District Court certified the class* and held that the gender discrimination in the federal statute and state regulations violates the Fifth and Fourteenth Amendments because it is not rational in light of the program's objectives and because it is based on the archaic and overbroad generalization that women are not breadwinners. The District Court agreed with all parties that extension of benefits to the class is the appropriate remedy.** Accordingly, it ordered the state to provide benefits to the class and appellant Califano to approve a plan to pay benefits to such families and federal matching funds for such benefits.

Massachusetts subsequently requested and on May 31, 1978 was granted a stay of the court's order to afford it time to implement a compliance plan. In its May 31st order at appellees' urging the Court rejected the state's suggestion that the order permitted the

* The state had merely objected to class certification without specifying any particular grounds. Thus there was no objection, for example, that the class as defined by plaintiffs was too broad.

** In its argument supporting extension, the state did not suggest that the AFDC-U program should be restructured to include a principal wage earner limit.

state to provide AFDC-U and/or Medicaid only to families deprived because of the unemployment of the "principal wage earner." The state then moved the Court to clarify or amend its April 20, 1978 order to permit the state to redesign its AFDC-U program to incorporate a principal wage earner test. On August 9, 1978 after extensive briefing by the state and appellees, the District Court denied the state's motion, stating that it is up to Congress to restructure the AFDC-U program beyond the Court's remedy in this case and that states can not limit the federal standards of eligibility for AFDC.*

ARGUMENT

I. SECTION 407 OF THE SOCIAL SECURITY ACT VIOLATES THE FIFTH AMENDMENT BECAUSE IT RESULTS IN THE DENIAL OF AFDC-U AND MEDICAID BENEFITS TO FAMILIES WITH CHILDREN DEPRIVED OF PARENTAL SUPPORT BECAUSE OF THE UNEMPLOYMENT OF THEIR MOTHER, SOLELY ON THE BASIS OF GENDER.

Summary affirmance is appropriate in this case since it does not present any novel questions of gender discrimination, the issue has presented no difficulty to the district courts which have considered it, and the three states affected have acquiesced in the decisions.** Thus, the District Court below held §407 of the Social Security Act unconstitutional because its gender discrimination is irrational in light of the important and explicit Congressional purposes behind the AFDC-U program and is based on the "archaic and overbroad generalization" that women are not breadwinners. The District Court's decision squarely follows recent decisions of this

* The state had been granted a further stay until October 1, 1978 and then until its application to this Court for a stay pending appeal is resolved, of so much of the April 20th order affects families with unemployed mothers and fathers employed 100 hours or more a month. On October 19, 1978 HEW served its motion to the District Court for a stay of the April 20, 1978 order pending appeal.

** Stevens v. Califano, 448 F. Supp. 1313 (N.D. Ohio 1978) appeal docketed Califano v. Stevens, No. 78-449 (U.S. Supreme Court) and Browne v. Califano, Civ. Action No. 77-1249 (E.D. Pa. June 9, 1978) appeal docketed Califano v. Browne, No. 78-603 (U.S. Supreme Court). Although the district courts also held the implementing state AFDC-U regulations unconstitutional and in all three cases the states have been ordered to provide benefits at partial state

Court involving gender discrimination.

Appellant Califano presents two arguments in favor of plenary review. First, he contends that the decision below is in error because the gender discrimination in §407 does not harm individuals on the basis of gender. Second, he argues that the gender classification is rational in light of the legislative purposes of the program and is not based on an archaic stereotype of the role of women in society.*

Turning to the first argument, the fact that there is gender discrimination is self-evident. Under §407 of the Act AFDC-U benefits are available to families with needy children in two-parent homes who are deprived of parental support or care because the father meets the federal definition of unemployed,** but similarly situated families with mothers who meet the federal definition of unemployed are denied aid. The only difference between the appellees' class and families who are provided aid under §407 is the gender of the parent who satisfies the federal definition.

HEW, however, attempts to suggest that this classification, admittedly based on gender,*** works no bias since the two-parent families with unemployed fathers provided aid under §407, and those with unemployed mothers denied aid inevitably contain both males and females, and that this Court's decision on gender

Footnote from previous page -

expense, none of the three states, including Massachusetts, has appealed the decision that the sex discrimination is unconstitutional.¹

* HEW suggests that the cost of the District Court's decision is a reason for plenary review. While the decision would mean additional expenditures, appellees question of the accuracy of HEW's cost estimates. Appellant Califano's Jurisdictional Statement (J.S.) at 7, n. 6. These estimates, presented for the first time, are not supported by any facts in the record. Moreover, cost alone is not a basis for plenary review, when the merits are as clear as they are in this case.

** The federal standard requires that the father be totally unemployed or employed less than 100 hours per month, 45 C.F.R. §233.100(a) (1)(i); (c)(1)(iii), and that he have six or more quarters of work in which he received earnings of not less than \$50 in any 13 calendar quarter period ending within one year prior to application for AFDC, or have received or qualified for unemployment compensation within such one year period. 42 U.S.C. §607(b)(1)(C). Also, the father must not have been employed for 30 days prior to the receipt of AFDC or have refused a bona fide job offer without good cause within such 30 day period, §607(b)(1)(A), (B).

*** See, Appellant Califano's J.S. at 7.

discrimination are therefore inapplicable. The Secretary cites Califano v. Goldfarb, 430 U.S. 199 (1977) in support, suggesting that while it is often difficult to determine whether a classification discriminates against women, there is no "loser" on the basis of sex in this case. (Appellant Califano's J.S. at 8, n. 8).

This argument is simply frivolous. Section 407 discriminates against mothers in two-parent homes such as Cindy Westcott and Susan Westwood by denying them and their families currently needed welfare benefits based upon their past employment which would have been provided if they had been male. The different views in the Goldfarb opinions as to whether the discrimination should be analyzed from the view of the prospective beneficiary (the widower) or the deceased wage earner (the female wage earner) were related to the Justices' opinions as to whether the classification favored surviving widows or penalized deceased female wage earners. In this case, there is no conceivable way in which the gender classification can be viewed as favoring women. Section 407 makes Cindy Westcott and Susan Westwood and their families "losers" simply because the unemployed parent in each family is female.

The classification in this case is therefore similar to that in Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) and is likewise discriminatory. In that case, the discrimination against the deceased wage earner mother deprived her surviving children, male and female, of the personal care and attention of the surviving parent by denying the widower the Social Security survivor's benefits which would have enabled him to remain at home to care for the children at a higher standard than would have been provided to him under the subsistence level AFDC and Medicaid program. Id. at 651. In this case the effect of the discrimination against unemployed mothers is even more devastating to the entire family, which is definition in dire financial need, since it results in the denial of subsistence level AFDC and/or Medicaid benefits.

The Court's analysis in Wiesenfeld therefore applies with full force to this case.* The Court recognized that the Social Security provision granting survivor's benefits to widows but not widowers penalized women wage earners by affording them less protection for their families than was afforded to male workers. Underlying the classification was an

"archaic and overbroad' generalization ... 'not ... tolerated under the Constitution' ... namely, that male workers' earnings are vital to the support of their families, while the earnings of female wage earners do not significantly contribute to their families' support." Id. at 643. See also p. 644 and n. 13.

The Court engaged in a careful review of the legislative history. It determined that the clear legislative purpose was to enable the surviving parent to remain home to care for the children and concluded that the gender classification was irrational in light of that purpose. See also Id. at 655 (Rehnquist, J. concurring).

This brings us to HEW's second argument, that the gender classification in §407 is not premised on the constitutionally invalid assumption that women in two-parent families are not breadwinners, and is not irrational in light of the clear legislative purpose. We therefore turn to a review of the legislative history of the AFDC program to discern its purposes and the basis for the gender discrimination.

The overarching Congressional purpose in designing the AFDC program, we submit, was to provide aid to families with children deprived of a breadwinner's support. We must address this point in some detail since HEW's Jurisdictional Statement does not

* HEW suggests that unlike the situation in Wiesenfeld, §407 does not denigrate the efforts of women workers, since it is not a program of unemployment compensation or one based on contributions or taxes of either parent. Appellant Califano's J.S. at 16. This is a distinction without a difference. The AFDC program is a need-based government benefit program which in this case is providing benefits on the basis of a prior work history. Entitlement is a matter of statutory right and the government may not unconstitutionally discriminate against classes of individuals in awarding benefits. See Shapiro v. Thompson, 394 U.S. 618 (1969).

acknowledge this central purpose despite the District Court's extensive treatment of this matter. We submit that HEW has chosen to avoid the paramount purpose of the AFDC program because it cannot show how the gender discrimination in §407 is constitutionally permissible in light of this pervasive legislative purpose.

As the Court recognized in King v. Smith, 392 U.S. 309, 327-330 (1960), the AFDC program, originally proposed by President Roosevelt in 1935 to counter the effects of the Depression, was intended to assist needy children who would not be helped by the Administration's work projects because no breadwinner was in the home.* Congress defined the needy children deprived of a breadwinner's support who would be eligible to receive benefits as children "deprived of parental support or care" because of the death, absence, or incapacity of a parent. Section 406(a) of the Social Security Act, 42 U.S.C. §606(a), 49 Stat. 629. Although during its consideration of the legislation Congress referred to the breadwinner as the father, undoubtedly a reflection of social patterns,** the statute it enacted was sex neutral and provided aid if a child were deprived because of the absence, death or incapacity of either the mother or father. From the outset therefore, AFDC was available to two-parent families in which the family was deprived because of the mother's incapacity, and also to families in which the father was the only parent in the home.

In 1961 Congress once again dealt with the deprivation caused children during a recession and extended AFDC, at the state's option, to reach children in two-parent families deprived of parental support or care because of the unemployment of a parent. Pub. L. No. 87-31, 75 Stat. 75.*** Congress thereby recognized

* Massachusetts agrees that the purpose of the AFDC-U program was to aid families deprived of a breadwinner's support. Appellant Sharp's Jurisdictional Statement (J.S.) at 4-5, 12.

** King v. Smith, supra, at 328; H. Rept. No. 615, 74th Cong., 1st Sess. (1935) at 10.

*** The AFDC-U program was initially authorized from May 1961 through June 1962. It was then renewed for 5 years and made permanent in 1967. 81 Stat. 821 (approved Jan. 2, 1968).

that children in "needy families in which the breadwinner is unemployed ..." were just as deprived of parental "support" by the unemployment of a breadwinner parent as they would be if the parent were absent, dead, or incapacitated.* The overriding purpose of the AFDC program continued to be the provision of aid to needy families deprived of parental support or care.

It was only in 1967 when Congress decided to make the AFDC-U program permanent that it made its first and only break with its 32 year history of providing aid on a gender neutral basis to children deprived of the support of either parent by denying AFDC-U benefits to children deprived because of the mother's unemployment. HEW claims that this novel gender limitation was the product of an actual, considered legislative choice (Appellant Califano's J.S. at 16-17), but this is not borne out by the record. The only explanation for the gender bias is the sparse statement in both Committee Reports:

"This program was originally conceived as one to provide aid for children of unemployed fathers. However, some States make families in which the father is working but the mother is unemployed eligible. The bill would not allow such situations. Under the bill the program could apply only to the children of unemployed fathers." S. Rept. No. 744, 90th Cong., 1st Sess. (1967) at 160. See also H. Rept. No. 544, 90th Cong., 1st Sess. (1967) at 108.

Given the plain language of the word "parent" in both §406 and §407, and the consistent history of providing AFDC under §407 to children deprived of support of either parent,** the statement that Congress meant "father" when it said "parent" in 1961 has absolutely no basis. There is also no indication whatsoever in this statement or elsewhere that Congress was abandoning the AFDC program's basic purpose of aiding families with children deprived

* See, e.g., S. Rept. No. 165, 87th Cong. 1st Sess (1961) at 2-3; 107 Cong. Rec. 3763 (March 10, 1961); and citations in the District Court's opinion, Appellant Califano's J.S. at 24a. Although Congress' references to the unemployed breadwinner as the father no doubt reflected social patterns, see, e.g. District Court opinion, J.S. at 24a-25a, n. 15, the original AFDC-U statute was sex neutral.

** HEW regulations prior to 1968 reflected the clear recognition that the child could be deprived because of the unemployment of either parent. Handbook of Public Assistance Administration, Part IV, §3424.21 (8/5/63).

of a breadwinner-parent's support. The only fair implication of the statement is that Congress - even in 1967 - was the victim of the stereotype that it was only the father's unemployment that deprived the children of significant support and that needed to be protected against. Of course, such an assumption is indistinguishable from the constitutionally impermissible archaic and overbroad generalizations that women are dependent on their husbands and that they are child-rearers and homemakers rather than family breadwinners. Califano v. Goldfarb, supra, 430 U.S. at 206-07, 217, 222-23 (plurality opinion and opinion of Stevens, concurring); Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wiesenfeld, supra; Frontiero v. Richardson, 411 U.S. 677 (1973).*

Appellant Califano's sole attempt to justify the gender discrimination in §407 relies on the argument that Congress made a conscious decision in 1967 to seek a solution only for the narrow problem of deserting fathers and not for the problem of children deprived of parental support because of unemployment of a parent. Appellant Califano's J.S. at 12. It is certainly true, as the District Court recognized, that a complementary purpose of the AFDC-U program was to discourage desertions and promote family stability. As we shall demonstrate, however, the gender discrimination is irrational in light of that purpose.

In 1961 and 1962, when Congress debated extending AFDC to families with children deprived because of a breadwinner's unemployment, it was clearly reacting not only to the financial needs of such families but also to a perceived structural incentive in §406 for parental desertion. Congress believed, as the Secretary argues, that the unemployed breadwinner in destitute families was encouraged to abandon the family so that the remaining parent and

* In its opinion, the District Court noted the substantial role that women play in the work force. See Appellant Califano's J.S. at 14a-15a n. 8 and 31a, n. 23.

children could qualify for AFDC under §406. In considering this matter, Congress spoke of an incentive for unemployed fathers to desert.* Congress addressed this problem by extending AFDC to two-parent families deprived of the unemployment of a parent. When the AFDC-U program was made permanent in 1968, Congress reiterated the family stability goal as a reason behind the permanent extension of AFDC. See, e.g., S. Rept. No. 744, 90th Cong. 1st Sess. (1967) at 160.

Appellant Califano's claims that the gender classification added to §407 in 1968 is justified because Congress was attempting to cure the specific, factually demonstrated problem of deserting unemployed fathers cannot save the statute, because it is totally unrelated to that legislative purpose.** In the first place, the gender classification actually undermines the legislative purpose. Families such as the Westcotts and Westwoods, who are deprived of desperately needed AFDC and/or Medicaid benefits because it is the mother who is unemployed, face the dilemma of remaining together and foregoing benefits or separating so that the remaining parent and children can qualify. As the District Court noted, after the Westcotts were denied AFDC-U benefits their landlord, impatient for his delinquent rent, suggested that William Westcott leave the home so that Cindy and her unborn child would be eligible for AFDC. (Appellant Califano's J.S. at 27 n. 16).

* The figures did show that most of the families receiving AFDC under §406 qualified because of the father's absence.

** Even though the legislative history from 1961 on contains references to the problem of deserting fathers, this most likely results from the fact that in two-parent homes women were more likely to be childbearers and homemakers, and thus perhaps less likely to desert their children. However, decisions of this Court have clearly rejected gender-based statutory classifications premised on notions about the family and work roles of men and women as inappropriate means of achieving statutory objectives, even when those notions have empirical support. *Weinberger v. Wiesenfeld*, *supra*, 420 U.S. at 644-45; *Frontiero v. Richardson*, *supra*; *Craig v. Boren*, 429 U.S. 190, 202 n. 13 (1976).

Secondly, although HEW cites references from the 1961-62 legislative history concerning the problem of deserting fathers, §407 was sex neutral until 1968. Thus, prior to 1968 Congress apparently did not consider that the goal of reducing the desertion incentive and promoting family stability should be addressed by a gender-based solution. Moreover, there is no indication that the 1968 change from "parent" to "father" was related to the problem of deserting fathers.* Indeed, the statement from the 1968 Committee Reports quoted above which purports to explain the reason for the change does not in any way link the change to the desertion problem. Thus, while there is no doubt that from 1961 on a purpose of the AFDC-U program as a whole was to remove the desertion incentive, there is no evidence whatsoever that the 1968 amendment restricting §407 to families of unemployed fathers was itself tailored specifically to address that problem.

Thus, Congress acted unconstitutionally in 1968 when it restricted §407 to families with unemployed fathers. The denial of aid to families with unemployed mothers is totally unrelated to the goal of promoting family stability by discouraging desertion and even undermines that goal. Moreover, there is obviously a gender neutral way to address the problem and foster the goals of the program, namely that used by Congress between 1961 and 1968 when aid was provided to families deprived because of a parent's unemployment.

The gender classification in §407 therefore cannot be justified and indeed is irrational in light of the explicit statutory purposes of aiding families deprived of a breadwinner's support and promoting family stability. HEW has not offered any other possible justification for the classification. While HEW asserts

* It is interesting that the bill proposed in 1967 by the Administration, H.R.5710 (90th Cong., 1st Sess.), would simply have made §407 permanent and would not have changed the language of the existing statute. Thus in 1967 the Administration apparently did not consider a gender based statute necessary to promote the anti-desertion aims of the AFDC-U program.

that the gender discrimination in §407 can survive scrutiny under any of the standards articulated by this Court in recent gender discrimination cases, appellees contend that, to the contrary, affirmance of the District Court decision is warranted under this Court's recent gender discrimination decisions. This case involves no new questions about the application of constitutional principles to gender discrimination claims and thus does not warrant plenary review.

In sum, the gender classification in §407 penalizes poor women by absolutely denying them and their families desperately needed AFDC-U and/or Medicaid benefits simply because the mother rather than the father is the unemployed parent. Section 407 is but another example of the discrimination that has long victimized women in our society. Frontiero v. Richardson, supra, 411 U.S. at 684; Cf. Califano v. Goldfarb, supra, 430 U.S. at 218 (Stevens, J. concurring) and 226 (Rehnquist, J. dissenting).*

The gender discrimination is based on a constitutionally impermissible archaic and overbroad generalization that women are not breadwinners, Weinberger v. Wiesenfeld, supra, and as the legislative history demonstrates is plainly not the product of an actual, considered legislative choice but merely the product of stereotyped thinking about the role of women. Califano v. Goldfarb, supra, 430 U.S. at 199 (Stevens, J. concurring). The classification is completely irrational in light of the explicit and important Congressional purposes of providing aid to families deprived of a breadwinner's support and promoting family stability by discouraging desertion. Weinberger v. Wiesenfeld, supra, 420 U.S. at 651 (majority opinion), 734 (Rehnquist, J. concurring).** The

* There is no way in which this classification can be viewed as favoring women or compensating them for past discrimination, nor has HEW asserted such a purpose. Therefore, the classification cannot be saved on this ground. See, Califano v. Webster, 430 U.S. 313 (1977); Califano v. Goldfarb, supra, 430 U.S. at 242 (Rehnquist, J. dissenting); Kahn v. Shevin, 416 U.S. 351 (1974).

** There is no possible way that absolute denial of benefits to families with an unemployed mother could be justified by an administrative convenience rationale, since the AFDC program requires individualized proof both that the child is deprived of parental

classification certainly bears no "fair and substantial relation to the object of the legislation" Reed v. Reed, 404 U.S. 71, 75 (1971) quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). Further, the classification neither serves the important government objectives revealed in the legislative history, nor is it substantially related to the achievement of those objectives. Califano v. Webster, supra, 430 U.S. at 316-17 quoting Craig v. Boren, supra, 429 U.S. at 197. Instead, as discussed above, the gender classification undermines those important statutory objectives.

For the above reasons, the April 20, 1978 order of the District Court holding §407 unconstitutional should be affirmed.

II. THE APPROPRIATE REMEDY IN THIS CASE IS SIMPLE ELIMINATION OF THE GENDER DISCRIMINATION IN THE AFDC-U PROGRAM, NOT SIMULTANEOUS RESTRUCTURING OF THE PROGRAM TO ADD A PRINCIPAL WAGE EARNER TEST AND TERMINATE CURRENTLY ELIGIBLE FAMILIES

The District Court carefully considered and agreed with the arguments of all parties that extension of AFDC-U rather than invalidation of the entire AFDC-U program was appropriate under the standards articulated by Mr. Justice Harlan in Welsh v. United States, 398 U.S. 333, 361-66 (1970) (concurring). The District Court appropriately decided to do the minimum necessary to repair the constitutional defect and extended benefits to class members under the same conditions that now apply to families with unemployed fathers. Since needy families are currently eligible under §407 if the father satisfies the federal definition of unemployed, the District Court entered partial summary judgment on April 20, 1978 ordering that aid also be provided to needy families if the mother satisfies

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support for one of the reasons specified in §§406(a) or 407 and that the family is financially needy. Appellees simply seek the same opportunity to make these showings and receive benefits that families with unemployed fathers are given under §407. Cf. Califano v. Goldfarb, supra, 430 U.S. at 230, 238 (Rehnquist, J. dissenting).

the federal definition of unemployed. In effect, the District Court's April 20, 1978 order enabled needy families to qualify for AFDC-U based on the unemployment of a parent, just as they had between 1961 and 1968.

Massachusetts subsequently abandoned its argument in favor of simple extension, and claimed that the District Court should restructure the AFDC-U program by limiting eligibility to needy families in which the parent who is the principal wage earner meets the federal definition of unemployed. This would have meant, of course, that needy families currently receiving benefits based on the father's unemployment would be terminated unless the father could show that he was also the principal wage earner. The District Court rejected these claims, stating that further modifications to §407 should be left to Congress.

The District Court's rejection of a principal wage earner test is so manifestly correct that plenary review by this Court is not warranted. HEW has not supported the state's attempts to restructure the program to deny aid to currently eligible families by imposing a principal wage earner restriction, nor has it appealed the District Court's remedy in this case.* Neither Ohio nor Pennsylvania, the state defendants in the other §407 sex discrimination suits now pending before this Court, Califano v. Stevens, supra, and Califano v. Browne, supra, has sought to impose a principal wage earner test.

* While HEW has not appealed the District Court's remedy, HEW suggests that it is free to define "unemployment" in any gender neutral way. Appellant Califano's J.S. at 6 n.5. Although this statement is vague, appellees dispute that HEW has the authority to define "unemployment" to include a primary wage earner test. Of course, even if HEW had such authority, it has not adopted such a regulation. Accordingly, Massachusetts is not free to impose such a test. HEW has also indicated to the District Court that it is considering whether to propose legislation to impose a principal wage earner test. Affidavit of Gilbert Fisher (Director of the Division of General Policy, Office of Policy and Regulations of the Social Security Administration, HEW), submitted to the District Court in support of HEW's October 19, 1978 motion for a stay of the District Court's April 20, 1978 order pending appeal. It is appellees' position that a principal wage earner test can be imposed only by legislation.

In determining whether a principal wage earner test is permissible the starting point is the plain meaning of the statute. Caminetti v. United States, 242 U.S. 470 (1917). Section 407(a) as is relevant here, defines a dependent child as one

"... deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father ..."

On the face of the statute, therefore, a needy family is eligible if the father meets the federal standards for unemployed even if the mother is the principal wage earner. Indeed, the HEW regulations implementing §407, first adopted in 1969 and amended several times thereafter, have never required or permitted a principal wage earner test. 45 C.F.R. §233.100. See also 45 C.F.R. §233.90(a). This contemporaneous and consistent interpretation of the Act by the agency charged with administering the AFDC program is entitled to deference. New York State Dept. of Social Services v. Dublino, 413 U.S. 405, 421 (1973); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). During the course of this litigation, the HEW Regional Office advised the state of its view that neither the statute nor federal regulations sanctions a principal wage earner limit.*

Thus, it is apparent that the language of statute bars a principal wage earner test. While the statutory language itself provides an adequate basis for rejecting the state's claim, the state has argued that the legislative history demonstrates that Congress intended to impose a principal wage earner test when it amended §407 in 1968. The legislative history plainly does not evidence such an intent, but only that Congress paid virtually no

*July 11, 1978 letter from Charles C. Gentile, Acting Asst. Reg'l. Cmmr. for Family Assistance to Stephen Kane, Asst. Cmmr. for Asst. Payments, Massachusetts Dept. of Public Welfare. Appendix A. This letter was a response to the state's submission of a proposed AFDC state plan amendment to apply a principal wage earner test. In its Jurisdictional Statement the state noted that HEW remained silent on the principal wage earner issue in the District Court (Appellant Sharp's J.S. at 8). This is technically correct in that HEW never made a formal submission to the Court. Nonetheless, plaintiffs did bring the HEW letter to the Court's attention.

attention the change from "parent" to "father".* What legislative explanation there is only indicates that the change was not fully thought out and was most likely the product of stereotyped views about the roles of fathers and mothers in two-parent families.** Since the legislative history is confusing and ambiguous on the principal wage earner point, the Court must rely primarily on the plain language of the statute. N.L.R.B. v. Plasterers' Local U. No. 79, 404 U.S. 116, 127-29 (1971); Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 412 (1971).

Thus, as discussed in Point I above, the only explanation in the legislative history for the introduction of gender discrimination to §407 is the cryptic statement in both Committee Reports that the amendment would prevent states from providing aid to families with a working father and an unemployed mother. While the statement indicates Congress' apparent disapproval of some states' eligibility criteria under the existing program, it alone simply cannot support the argument that Congress intended a principal wage earner restriction. Thus, Congress appears to have been reacting to the perceived problem that some states were providing AFDC-U benefits to families who were not actually deprived of a breadwinner parent's support. Congress apparently further assumed that mothers in two-parent families were simply not wage earners and that a claim for benefits on account of their "unemployment" was therefore per se suspect. Accordingly, Congress prohibited families from qualifying for AFDC-U based on the mother's unemployment.

Massachusetts has not cited any evidence that Congress actually considered the situation of two-parent families with two wage earners, one of whom becomes unemployed thus rendering the family needy, and decided not to provide aid to such families.

* The other proposed changes in the AFDC-U program, for example establishing a federal definition of unemployed, and a prior work history test, received much more attention.

** For example, during Senate hearings on the bill, H.R. 12080 (90th Cong. 1st Sess.) even prominent HEW witnesses and members of Congress did not focus on the gender discrimination that had been added to §407 by the House. Both Wilbur Cohen, Undersecretary of HEW and Senator Robert F. Kennedy erroneously and consistently referred to the program in the House-passed bill as one for dependent children of unemployed parents. Hearings of the Senate Finance Committee on H.R. 12080, 90th Cong., 1st Sess. (1967) at 268-69, 781.

Indeed, had Congress actually considered this issue and decided to adopt a principal wage earner test, it certainly would have known how to use precise language. The term "father" certainly does not accomplish this result and strongly argues that Congress did not intend such a test.*

In the absence of any definitive legislative history supporting its position, Massachusetts is left with the argument that the frequent use of the term "breadwinner" by Congress in its discussion of AFDC legislation (although never in the Act itself) since 1935 supports a principal wage earner test. See Point I, supra. But Congress used the term indiscriminately during its consideration of the AFDC-U legislation in 1961 and 1962 when it provided aid to children deprived because of the unemployment of a parent, and in 1967 when it limited AFDC-U to families deprived because of the father's unemployment even if the father were not the principal wage earner. The general use of this term throughout the history of the AFDC program cannot support an argument that Congress intended a principal wage earner test when it amended §407 in 1968.

In sum, the plain language of §407 and its longstanding interpretation by HEW bar a primary wage earner test.** The sparse and ambiguous legislative history does not provide a basis for ignoring the statutory language and thus cannot justify such a

* The state also relies on Stevens v. Califano, supra, to support its legislative history argument. That Court did apparently interpret the obscure Committee Report language as an attempt to disqualify families if one parent were fully employed. However, the Court recognized that this alleged purpose was not accomplished and that it was up to Congress, not the Court, to change §407 in that regard. Thus, Stevens ultimately offers no support to the state's argument.

**Even if §407 were determined to permit a principal wage earner test, an existing Massachusetts state would bar the state from implementing such a limit. Thus, M.G.L.A. Ch. 118, §1 (West 1969) defines a dependent child for AFDC to include a child "deprived of parental support or care by reason of the unemployment of a parent." This statute was adopted prior to the 1968 amendments to §407, and when §407 no longer authorized AFDC matching funds for children with unemployed mothers, state regulations were required by another state statute to limit AFDC-U to children of unemployed fathers. Whitfield v. Minter, 368 F. Supp. 798, 803 n. 10 (D. Mass. 1973). See also the District Court's opinion in Appellant

radical restructuring of the AFDC-U program as a principal wage earner test would constitute.*

The state further argues that the result of the April 20, 1978 order, which in effect restores the AFDC-U program to the gender neutral structure that existed between 1961 and 1968,** is out of harmony with the structure of the AFDC program and eliminates the requirement of unemployment. This is plainly wrong.

First, the District Court's remedy is completely consistent with the structure of AFDC, which since 1935 has provided aid to needy families deprived of parental support because of the absence, death, or incapacity of either parent. See 42 U.S.C. §606(a).

While the nature of the requirement that a child be deprived of parental support for specified reasons is such that generally one-parent families qualify, two-parent families have always been eligible for aid if the reason for deprivation is the incapacity of one parent. There is no restriction as to which parent's incapacity can qualify the family under §407(a). The extension of benefits to needy families deprived of support because of the unemployment of either parent under the order of the Court below would operate in a similar fashion and therefore is fully consistent with the

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Califano's J.S. at 7a-8a. If it were determined that §407 permitted a principal wage earner test at state option, the state statute would bar Massachusetts from taking advantage of this option.

* It therefore follows, under well-established precedents of this Court, beginning with King v. Smith, *supra*, and continuing through the recent decision in Quern v. Mandley, 98 S. Ct. 2068 (1978) that the state is not free to implement a principal wage earner test on its own. Thus, as these cases teach, "in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history ...", Townsend v. Swank, 404 U.S. 282, 286 (1971), state regulations which exclude people eligible for AFDC under the federal standards violate the Social Security Act.

** On at least one other occasion where this Court has held unconstitutional an eligibility restriction for government benefits, the effect of extending benefits to the excluded class was to revert to the structure of the statute prior to the addition of the unconstitutional restriction. See, Moreno v. United States Dept. of Agriculture, 345 F. Supp. 310, 315-16 (D.D.C. 1972), aff'd, 413 U.S. 528 (1973).

structure of the program.* Second, the state's suggestion that the extension ordered by the District Court would eliminate the requirement of unemployment without a principal wage earner test is simply wrong. See Appellant Sharp's J.S. at 16, but see n. 6. At any time for a family to be eligible there must be a parent who can satisfy all the requirements for being unemployed, including the prior work history test. See n.**, p. 7, supra.

The state's main reliance is not upon the statute or the legislative history, however, but on policy arguments in support of its position that Congress intended a principal wage earner test when it amended §407 in 1968. In effect, it suggests that a principal wage earner test is so clearly correct that Congress must have intended such a test in 1968 even though it did not say so. Appellees submit, however, that the policy choices involved in a principal wage earner test are difficult ones, that Congress did not consider them, and that resolution of these issues is appropriately left to Congress. See Philbrook v. Glodgett, 421 U.S. 707, 719 (1975).

For example, the principal wage earner issue forces a decision as to which among equally needy families are to be granted aid. Thus, a principal wage earner test could mean that a family with an unemployed secondary wage earner but an employed principal wage earner earning X dollars would be denied aid while another family of the same size with an unemployed principal wage earner and an employed secondary wage earner also earning X dollars would be eligible.

Another difficult policy issue raised by the state is whether AFDC-U benefits should continue when and if the second parent succeeds in finding employment. The state claims that the expanded eligibility resulting from the District Court's order coupled with

* In unusual cases both parents might be incapacitated or both might be unemployed. In such cases, if the qualifying parent ceases to be incapacitated or unemployed, the other parent's incapacity or unemployment could qualify the family.

the earned income disregard provisions of §402(a)(8) of the Act, 42 U.S.C. §602(a)(8) would make more families eligible for a longer period of time than the state considers desirable. (Appellant Sharp's J.S. at 15-19).* However, the state's concern in this regard appears to stem more from the effect of the separate and important Congressional policy of disregarding part of a recipient's earnings, 42 U.S.C. §602(a)(8), than from the effect of the April 20, 1978 order. The earned income disregard of §402(a)(8) reflects Congress' judgment of the importance of providing a financial incentive for recipients to seek and retain employment. See Mr. X v. McCorkle, 333 F. Supp. 1109 (D.N.J. 1970), aff'd as modified sub. nom. Amos v. Engleman, 404 U.S. 23 (1971).**

On the other hand, a principal wage earner test would clearly hurt needy families whom many would argue as a matter of policy should not be hurt. This is evident from the situation of the appellees Cindy and William Westcott. Thus, the state has notified the Westcotts that they will be terminated from AFDC-U even though they are still needy under the financial eligibility standards, because Mr. Westcott has recently found full-time employment.*** It has proposed to take this action because the District Court's April 20, 1978 order has been stayed with respect to families with mothers meeting the federal test of unemployment and fathers employed over 100 hours a month. The state proposed to take this action even though it appeared that the Westcotts would actually be financially worse off because Mr. Westcott had found his first steady

* While expansion of the AFDC-U program in line with the District Court's April 20, 1978 order will undoubtedly entail some additional state expenditures, appellees have previously questioned the accuracy of the cost figures presented by the state. Appellant Sharp's J.S. at 18.

** The issue of the earned income disregard continues to be one that Congress struggles with. In the last session of Congress, there were various proposals to change the disregard (e.g. H.R. 7200 95th Cong., 1st Sess.), §524 as reported by the Senate Finance Committee, S. Rept. No. 95-573, 95th Cong., 1st Sess. (1977)), but none have become law.

*** The Westcotts have previously been receiving benefits based on Cindy Westcott's unemployment. The threatened termination has not yet occurred, and an administrative hearing is pending.

employment and lost AFDC-U eligibility than if he had not found the job and the family continued to be totally dependent on the AFDC-U grant.* The Westcotts' situation illustrates the implications of a principal wage earner test for needy families and the difficult nature of the policy choices involved.

Under the District Court's April 20th order, no family would receive benefits unless, and then only for as long as, they were needy under the state's financial eligibility standards. The District Court simply extended benefits to the class, doing all that was necessary to repair the constitutional violation in a manner consistent with the existing statute. Clearly the balancing of the interests of needy families such as the Westcotts and the state's interests in limiting eligibility under the federal-state AFDC-U program is one properly left to Congress. It is thus up to Congress to redesign the AFDC-U program in light of the April 20, 1978 order if it so desires.**

In sum, this Court should affirm the District Court's decision barring Massachusetts from imposing a principal wage earner limit on eligibility for AFDC-U.

* This information was presented to the District Court in Plaintiffs' Notice Of Massachusetts Planned Action To Terminate The Westcotts' AFDC-U and Medicaid Because of Mr. Westcott's Employment and HEW's Reaction to the State's Principal Wage Earner Test (July 28, 1978).

** Not only is it impossible to discern Congress' intent in 1967 with respect to the principal wage earner issue, it is also impossible to predict how, if at all, Congress would react to a decision of this Court affirming the orders below. Thus, after this Court's decision in Califano v. Goldfarb, supra, which in effect extended to widowers the survivors' benefits available to widows without a proof of dependency requirement, one might have thought that Congress would subsequently have applied a dependency test to all claimants. Instead, Congress responded by providing in section 334 of Pub. L. No. 95-216, 91 Stat. 1544 that social security retirement and survivors benefits payable to spouses and surviving spouses respectively be reduced by the amount of any public retirement benefit paid to the spouse. Congress specifically declined to apply a dependency test to all claimants since it considered that such a test would be subject to manipulation. See S. Rept. No. 95-572, 95th Cong., 1st Sess. (1977) at 27-28.

CONCLUSION

For the reasons stated above, appellees respectfully request that the District Court's April 20, 1978 and August 9, 1978 orders be affirmed.

November 14, 1978

Respectfully submitted,


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July 11, 1978

Mr. Stephen Kane
Assistant Commissioner for Assistance Payments
Department of Public Welfare
600 Washington Street
Boston, Massachusetts 02111

Dear Mr. Kane:

This is in reply to your letter of June 14, 1978, with which you sent us, for review, a copy of a draft State Letter you proposed to issue to the field on the subject of the unemployed parent. This has been necessitated by the Westcott v. Califano and Sharp case. You requested our comments to assure correctness and acceptance of your revised State Plan.

Since the Court's Order of May 31, 1978 allowed your motion to stay extension of AFDC and Medicaid benefits to unemployed mothers until August 1, 1978, you have until that date to come into full compliance with the Court's Order of April 20, 1978. The May 31st Order also requires you to identify and keep records of all members of the plaintiff class who applied for AFDC-U or Medicaid after April 21, 1978, in order to be able to determine their eligibility for benefits and to pay such benefits as soon as the stay has expired.

The Court's Order of May 31, 1978 pointed out that the April 20th Order does not authorize the imposition of additional limitations on the awarding of AFDC-U or Medicaid benefits, including the primary wage earner limitation which you propose. While your motion of May 10, 1978 to clarify or amend the Court's Order has not been acted upon, our Regional Attorney believes that it is unlikely that the court will permit the adoption of a primary wage earner standard. Unless and until the court does so, we cannot assume that a primary wage earner standard is permissible.

Aside from the court action, our Regional Attorney doubts that HEW could approve a primary wage earner standard of eligibility for AFDC-U benefits under the current statute (which has become sex-neutral as a result of litigation). This is based on the fact that while Congress,

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ASSISTANCE PAYMENTS

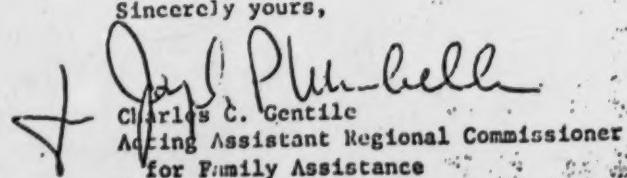
in enacting Section 407 of the Social Security Act, may have had in mind the idea of the breadwinner, in actual practice benefits under Section 407 have been provided to all unemployed fathers who meet the statutory and regulatory requirements, regardless of whether the father was actually the principal wage earner or not. Therefore, it is doubtful that, without specific legislation, HEW can take the position that the unemployed parent who is not the primary wage earner is ineligible for benefits. Our Regional Attorney is of the opinion that under the Court's two Orders, AFDC-U benefits must be extended to families in which the mother is unemployed on the same basis as they are granted to families with unemployed fathers.

Our Regional Attorney also points out that the Supreme Court in Batterton v. Francis, 97 S. Ct. 2399 (1977), emphasized that Congress expressly delegated to the Secretary the power to prescribe standards for determining what constitutes "unemployment" for purposes of AFDC-UF eligibility. The Secretary's regulations nowhere give states discretion to define unemployment in terms of a principal wage earner, nor more specifically in terms (as your proposed Section 303.01 provides) of the parent whose "earned income or unemployment compensation was greater during the six calendar months preceding the month of application, reapplication or redetermination of eligibility".

Section 303.04(D) of your proposed draft would appear to require WIN registration by the unemployed parent without exceptions. This is contrary to Section 507 of P.L. 94-566 which provides that the exemptions contained in Section 402(a)(19)(A) are applicable to unemployed fathers/parents who apply for benefits under Section 407. Thus, an unemployed father may be exempt from WIN registration as a relative caring for a child under six years of age under Section 402(a)(19)(A)(v). With regard to Section 402(a)(19)(A)(vi), in so far as this exemption is sex discriminatory and has not been available to individuals receiving benefits under Section 407, our Regional Attorney believes HEW's position should be that this exemption is not now available to unemployed mothers seeking benefits under Section 407. In the Westcott case, plaintiff's attorney indicated that the same exemptions should be available to unemployed mothers as are now available to unemployed fathers. Therefore, with regard to WIN registration for unemployed mothers, our Central Office will have to resolve the problem before we can advise you about the acceptance of your proposed Section 303.04(D).

We hope this letter is helpful. We shall advise further as soon as we hear from our Central Office.

Sincerely yours,


Charles C. Gentile
Acting Assistant Regional Commissioner
for Family Assistance

Supreme Court, U.S.

FILED

No. 78-437

FEB 1 1979

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States
OCTOBER TERM, 1978

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH,
EDUCATION, AND WELFARE, APPELLANT

v.

CINDY WESTCOTT, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE APPELLANT

WADE H. MCCREE, JR.

Solicitor General

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Rainwater, <i>Crucible of Identity: The Negro Lower-Class Family</i> , 95 Daedalus 209 (1965)	32

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-437

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH,
EDUCATION, AND WELFARE, APPELLANT

v.

CINDY WESTCOTT, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE APPELLANT

OPINION BELOW

The opinion of the district court (J.S. App. 1A-37A) is not yet reported.

JURISDICTION

The order of the district court declaring unconstitutional and enjoining appellant from enforcing part of 42 U.S.C. 607 was entered on April 20, 1978

(1)

(J.S. App. 39A-42A). A notice of appeal to this Court was filed on May 17, 1978 (J.S. App. 43A-44A). On July 7, 1978, Mr. Justice Brennan extended the time for docketing the appeal to and including August 15, 1978, and on August 7, 1978, he further extended the time to and including September 14, 1978. The appeal was docketed on that date, and this Court noted probable jurisdiction on December 11, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1252. See *Weinberger v. Salfi*, 422 U.S. 749, 763 n.8 (1975).

QUESTION PRESENTED

Whether Section 407 of the Social Security Act, which provides benefits to two-parent families in which a dependent child has been deprived of parental support because of the unemployment of his father but does not provide benefits when the mother becomes unemployed, violates the Due Process Clause of the Fifth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

No person shall be * * * deprived of life, liberty, or property, without due process of law.

Section 407 of the Social Security Act, 42 U.S.C. 607, is set forth in the Appendix to this brief.

STATEMENT

1. The Aid to Families with Dependent Children program, 42 U.S.C. 601 *et seq.*, provides financial assistance to families with needy dependent children. If a state elects to participate in the program, it must comply with the requirements set forth in 42 U.S.C. 602(a) and the applicable federal regulations, and its plan must be approved by the Secretary of Health, Education, and Welfare in order for the state to qualify for federal reimbursement for a percentage of its expenditures. 42 U.S.C. 602-603. If a state that participates in the AFDC program also participates in the Medicaid program, persons who receive AFDC benefits are entitled to receive Medicaid benefits. 42 U.S.C. 1396a(a)(10).

AFDC benefits are intended to assist needy "dependent" children. The program originally was limited to children who were needy and had been deprived of the support of one parent because of that parent's death, absence, or incapacity. *Batterton v. Francis*, 432 U.S. 416, 418 (1977). The Act now also provides assistance to certain families where both parents are present and neither is disabled. Section 407(a) of the Act, 42 U.S.C. 607(a), defines the term "dependent child" to include a "needy child * * * who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father * * *." This portion of the program is known as Aid to Families with De-

pendent Children, Unemployed Father (AFDC-UF). Although every state participates in the AFDC program, only 26 states (and the District of Columbia) participate in the AFDC-UF program.¹ Massachusetts participates in the AFDC-UF program. 6 CHSR III, Subch. A, Pt. 301, § 301.03; Pt. 303, Subpt. A, §§ 303.01, 303.04.²

2. In November 1976 appellees Cindy and William Westcott, who have one son, applied to the Massachusetts Department of Public Welfare for public assistance (A. 39). The Westcotts were informed that they did not qualify for AFDC-UF benefits because William, who was unable to find work, had not previously been employed for a sufficient period to qualify as an "unemployed" father under 6 CHSR III, Subch. A, Pt. 303, Subpt. A, § 303.04 (A. 39). In February 1977 appellees Susan and John Westwood, who have one son, applied for Medicaid benefits (A. 39).³ The Westwoods' application also was

¹ See Assistance Payments Administration, Social Security Administration, Department of Health, Education, and Welfare, Characteristics of State Plans for Aid to Families With Dependent Children Under the Social Security Act Title IV (1976 ed.).

² Although Massachusetts statutes define a "dependent child" for purposes of the AFDC program to include "a needy child who has been deprived of parental support or care by reason of * * * the unemployment of a parent," Mass. Ann. Laws ch. 118, § 1 (Law. Co-op 1975), its regulations limit this aid to families where the father is unemployed. 6 CHSR III, Subch. A, Pt. 301, § 301.03; Pt. 303, Subpt. A, § 303.01.

³ Pursuant to 42 C.F.R. 448.1(a)(1) and (c), a state may elect to provide Medicaid coverage to families that are eligible

denied because the father's work history was insufficient (A. 39-40).

3. Appellees then instituted this class action in the United States District Court for the District of Massachusetts, naming as defendants the Secretary of Health, Education, and Welfare and the Commissioner of the Massachusetts Department of Public Welfare (A. 8-20). Appellees contended that Section 407 of the Social Security Act and the implementing state regulations discriminate on the basis of gender in violation of the Fifth and Fourteenth Amendments to the United States Constitution. They sought declaratory and injunctive relief against continued enforcement of Section 407 and the state regulations.

The Commissioner stipulated that the Department of Public Welfare would reconsider appellees' eligibility (A. 28, 37); it concluded that the Westcotts and the Westwoods satisfied all the requirements of eligibility for AFDC-UF benefits except for the requirement that the "unemployed" parent be the father (A. 39, 40). The mother in each family is unemployed and each mother has a work history sufficient to meet the federal and state tests of eligibility that are applied when fathers are unable to find work (*ibid.*).⁴

for AFDC benefits, but who have not applied for cash assistance. Massachusetts provides coverage for such families. Mass. Public Assistance Policy Manual, Ch. I, § F, Subd. 2a.

⁴ The Commissioner and appellees stipulated that appellees would receive during this litigation the benefits they had requested, provided that they continued to meet the eligibility requirements (with the exception of the requirement that the unemployed parent be the father) (A. 28, 37).

The district court certified the case as a class action under Fed. R. Civ. P. 23(b), defining the class as all Massachusetts families who would be eligible for AFDC-UF (and therefore Medicaid) benefits but for the requirement in Section 407 that the unemployed parent be the father (J.S. App. 11A-19A).⁵

The court concluded that appellees had established that Section 407 violates the Due Process Clause. It stated that *Craig v. Boren*, 429 U.S. 190, 197 (1976), and *Califano v. Webster*, 430 U.S. 313 (1977), establish that gender-based distinctions are unconstitutional unless they "serve important governmental objectives and [are] substantially related to achievement of those objectives" (J.S. App. 21A-22A). The court concluded that the governmental objectives of the AFDC and AFDC-UF programs are "the protection and care of needy children in families without a breadwinner's support and the maintenance of family structure and stability" (*id.* at 23A). These objectives, the court held (*id.* at 26A-28A), are not served by the gender distinction in Section 407, which denies assistance to needy children in families where the mother, who had been the breadwinner, becomes unemployed; in such cases, the court reasoned, the AFDC program encourages fathers to desert so their families can qualify for benefits (*id.* at 27A-28A). The court also stated (*id.* at 29A-30A) that the gender distinction in Section 407 "appears to rest on an 'archaic and overbroad generalization,'

⁵ We do not contest the class certification.

Schlesinger v. Ballard, [419 U.S. 498], 508, about the role of women in society." Although the court acknowledged that the generalization that men are likely to be the primary supporters of their families is not without some empirical support, it found the generalization "clearly archaic and overbroad" (*id.* at 30A-31A).

Finally, the court concluded that the proper remedy is the extension of the AFDC-UF program to all families with needy dependent children where either parent is unemployed within the meaning of the Act and implementing regulations (*id.* at 34A-37A).⁶

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 407 unquestionably entails a distinction on the basis of gender. A family in which the father (but not the mother) is "unemployed" is eligible for benefits if it otherwise satisfies applicable need tests; a family in which the mother (but not the father) is unemployed is not eligible, even though it may be as needy as the first family.

But in one fundamental respect this case differs from any previous case in which this Court has con-

⁶ The district court entered a temporary partial stay of its order but denied a full stay pending appeal. On January 8, 1979, this Court stayed the district court's order pending disposition of the case.

⁷ We use "unemployed" as a term of art, designating a person who not only is out of work but also meets the duration-of-employment and other criteria of Section 407 and the Secretary's regulations. See 45 C.F.R. 233.100.

sidered gender distinctions: although the statute calls for a gender-based distinction, the result of applying the statute is not gender-biased. The AFDC-UF program assists two-parent "families" with dependent children. The gender distinction contained in Section 407 does not come into play unless both parents are present in the family. The statute provides for a grant of aid, triggered by the father's unemployment, that benefits the entire family—which necessarily includes a father, a mother, and one or more children. In every case the grant or denial of aid to the entire family affects, to an equal degree, one man, one woman, and children of both sexes. This sex-neutral outcome is the backdrop against which the gender distinction in Section 407 must be evaluated.

A

Section 407 was intended to correct a flaw in the AFDC program, namely the program's tendency to induce unemployed fathers to desert so that their wives and children could become eligible for AFDC benefits.

Since its inception, the AFDC program has been designed to assist children who are needy because one parent is absent, dead, or incapacitated. Congress has not used the program to assist children whose parents are present in the home and able-bodied, but unable to find employment. Congress took a tentative step toward broadening the role of the AFDC program in 1961 by enacting a temporary program for children of unemployed parents. Evidence pre-

sented to Congress in 1961 revealed not only a short term problem caused by a recession but also the more fundamental problem that the AFDC program itself encouraged unemployed fathers to desert their families so that they would qualify for benefits. There was no evidence of desertion by a significant number of mothers.

When in 1967 Congress adopted Section 407 as permanent legislation, it elected not to reorient the AFDC program to provide aid for all children who were needy. Instead, the legislative history reveals that Congress determined to create a narrow adjunct to the AFDC program designed to offset the incentive for certain recently unemployed fathers to desert their families in order to enable them to receive AFDC benefits. Consistent with the limited aim of removing the incentive for unemployed fathers to desert, Congress deliberately changed the term "parent," which had been used in the earlier temporary enactment, to "father."

B

This Court has articulated a variety of standards in gender distinction cases. The opinion of the Court in *Craig v. Brown*, 429 U.S. 190, 197 (1976), identifies an intermediate standard of review: "[t]o withstand constitutional challenge, * * * classifications by gender must serve important government objectives and must be substantially related to achievement of those objectives." Yet other opinions in *Craig* stated that the Court had not established a new standard of review for gender discrimination cases and emphasized

the importance of factors such as whether a particular classification is based on a considered legislative judgment or merely results from reliance on a stereotype. See *id.* at 210 n.* (Powell, J., concurring), *id.* at 211-214 (Stevens, J., concurring). And Mr. Justice Rehnquist argued that same Term, in an opinion joined by three other Justices, that the standard of review in gender-distinction cases should depend on the nature of the statute in question; social welfare legislation, he contended, should be upheld when it embodies a reasonable empirical judgment consistent with the legislative design. *Califano v. Goldfarb*, 430 U.S. 199, 224-242 (1977) (Rehnquist, J., dissenting).

Section 407 is constitutional under any of these approaches. The gender distinction in Section 407 does not rely on or perpetuate overbroad and outmoded stereotypes about the roles of the sexes. It reflects, instead, Congress' considered decision to rectify the AFDC program's tendency to encourage unemployed fathers to desert their families so that the latter could receive AFDC benefits. Congress wanted to deal with this problem without adopting a general program of welfare for all needy children or for all unemployed parents. The means Congress selected did not discriminate in favor of or against either sex. AFDC benefits are not based on contributions to a fund, they are not payments for work performed by either parent, and they are not unemployment compensation. Accordingly, Section 407 does not result

in female employees receiving less compensation than male employees, and it does not diminish the value of taxes or contributions paid by mothers.

ARGUMENT

Whether a statute violates the Due Process Clause of the Fifth Amendment depends both on the meaning and purpose of the statute and on the standards of rationality that a statute must meet to be sustained. In this case the statute is part of a social welfare program, and it is unusual because, although it draws distinctions based on sex, it does not discriminate for or against women. We therefore first take up the background and purpose of the statute and then turn, at pages 24-40, *infra*, to the appropriate standards of constitutional analysis and their application to a gender-based statute that does not produce gender-biased results.

A. CONGRESS ENACTED SECTION 407 TO REDUCE THE INCENTIVE FOR UNEMPLOYED FATHERS TO DESERT THEIR FAMILIES IN ORDER TO MAKE THEM ELIGIBLE FOR FEDERAL AID

The AFDC program was enacted in the wake of the Depression to meet the needs of children who would not be aided by work relief programs—children deprived of parental support because of the absence, death, or incapacity of one parent. S. Rep. No. 628, 74th Cong., 1st Sess. 17 (1935). Congress assumed that work relief programs and the revival of private industry would meet the needs of children whose

parents were present in the home and able-bodied, but unable to find employment.* The AFDC program retained this focus until the 1960s, when Congress enacted Section 407 and its temporary precursor.

The adoption of Section 407 did not signal a legislative decision to use AFDC funds to alleviate the loss of income caused by unemployment in general. Indeed, Section 407 provides no benefits for children who presumably suffer the most serious deprivation because of unemployment, *i.e.*, children whose parents have no significant work experience or who have been unemployed for an extended period of time. Section 407 extended benefits only to needy children in families whose unemployed fathers had a substantial and recent connection with the work force. The program retained a needs test, and the definition of unemployment meant that the need had to be new and acute rather than chronic.

* The Senate Committee explained (*ibid.*):

Many of the children included in relief families present no other problem than that of providing work for the breadwinner of the family. These children will be benefited through the work relief program and still more through the revival of private industry. But there are large numbers of children in relief families which will not be benefited through work programs or the revival of industry.

These are the children in families which have been deprived of a father's support and in which there is no other adult than one who is needed for the care of the children. These are principally families with female heads who are widowed, divorced, or deserted.

The legislative history shows that Congress intended Section 407 to eliminate a specific flaw in the basic AFDC program—that program's tendency to induce fathers who were unable adequately to support their families to desert their homes so that their families could become eligible for benefits. Because the presence of both parents in the home disqualified a family from the AFDC program, a father might significantly help alleviate his family's financial problems by deserting. Congress was presented with evidence that approximately one-fifth of the AFDC caseload involved cases of paternal desertion and that the AFDC program itself contributed to the break-up of families by encouraging unemployed fathers to leave home to enable their wives and children to receive AFDC benefits. There was no evidence, however, that any significant number of mothers deserted.

1. One of the Principal Purposes of the Legislative Precursor of Section 407 Was to Reduce the Incentive for Unemployed Fathers to Desert Their Families

a. The legislative precursor to Section 407 was the Act of May 8, 1961, Pub. L. No. 87-31, 75 Stat. 75 (hereinafter "the 1961 Act"), which extended AFDC benefits for the first time to children in families where both parents are present and able-bodied, but one or both is unemployed. The 1961 Act was a temporary measure enacted during a period of severe recession accompanied by the highest unemployment since World War II. H.R. Rep. No. 28, 87th Cong.,

1st Sess. 2 (1961) (hereinafter "1961 House Report").

As part of a broad program to relieve the hardship caused by the recession, the President proposed "that the Congress enact an interim amendment to the aid to dependent children program to include the children of the needy unemployed." 107 Cong. Rec. 1679 (1961). The President stated (*ibid.*):

Under the aid to dependent children program, needy children are eligible for assistance if their fathers are deceased, disabled, or family deserters. In logic and humanity, a child should also be eligible for assistance if his father is a needy unemployed worker—for example, a person who has exhausted unemployment benefits and is not receiving adequate local assistance. Too many fathers, unable to support their families, have resorted to real or pretended desertion to qualify their children for help. Many other fathers are prevented by conscience and love of family from taking this route, thereby disqualifying their children under present law.

In response to the President's message, the House of Representatives conducted hearings on the proposal to extend the AFDC program. *Hearings on H.R. 3864 and 3865 Before the House Comm. on Ways and Means*, 87th Cong., 1st Sess. (1961) (hereinafter "1961 Hearings"). Abraham Ribicoff, then Secretary of Health, Education, and Welfare, urged that the legislation proposed by the Administration "would eliminate one of the major concerns that has been expressed through the years about the aid to de-

pendent children program—namely, that unemployed fathers are forced to desert their families in order that their families may receive aid." *1961 Hearings, supra*, at 95. The Secretary presented evidence that in 65.4% of all families receiving benefits under the existing program of aid to dependent children both parents were alive, neither was incapacitated, but the father was absent from the home. *1961 Hearings, supra*, at 96-97. In 18% of all AFDC families the father had deserted the family. *Ibid.* Numerous witnesses testified that the AFDC program was inducing fathers who became unemployed to abandon their families in order to allow them to qualify for AFDC benefits. *1961 Hearings, supra*, at 222, 277-280, 328-334, 350, 352, 354, 420, 421.

There was no evidence before Congress that any significant number of mothers deserted their families in order to allow them to become eligible for benefits. Indeed, although Secretary Ribicoff did not provide a separate figure for families where the father was present and the mother had deserted, he presented evidence that in only 1.8% of AFDC families was the father present and the mother dead, incapacitated, or absent for any reason. *1961 Hearings, supra*, at 96-97.

b. The House Committee reported favorably on the proposed legislation. *1961 House Report, supra*. The Committee's statement of the "Need for the Legislation" quoted the full text of the President's statement calling for extension of the AFDC pro-

gram because “‘[t]oo many fathers, unable to support their families, have resorted to real or pretended desertion to qualify their children for help.’” *Id.* at 2.

Although the President’s statement had focused primarily on children of unemployed fathers, the bill reported by the House Committee,⁹ and ultimately enacted, was drafted more broadly to include in the definition of “dependent child” a needy child “who has been deprived of parental support or care by reason of the unemployment (as defined by the State) of a parent * * *.” *1961 House Report, supra*, at 10.

During the course of the debates some of the proponents of this bill supported it as a general extension of the AFDC program to “needy families where the need is occasioned by unemployment.” 107 Cong. Rec. 3759 (1961) (remarks of Rep. Lane). For example, Representative Byrnes argued that “[i]t is very difficult, if not impossible, to distinguish as far as the plight of the needy child is concerned between the child in the family of, let us say, a disabled breadwinner who cannot work, and the needy child in a family where the breadwinner is unable to find work of any kind in order to support his family.” 107 Cong. Rec. 3767 (1961).

Other proponents of the legislation in both the House and the Senate debates supported the bill on the narrower ground suggested by the President, advocating its passage to eliminate the incentive the

AFDC program then gave unemployed fathers to desert. For example, Representative Ryan commented that “this bill highlights a permanent problem in our aid-to-dependent-children program which allows payments to the family of the father who deserts his family but penalizes the father who, in the words of the President, is prevented by conscience and love of family from taking this route.” 107 Cong. Rec. 3769 (1961). Representative Baldwin stated that “the biggest single problem which has been created by the aid-to-needy-children program as it exists today is that the actual wording of the present law stimulates the breaking up of homes.” *Id.* at 3765. Referring to examples cited in the hearings, he added that “[t]here is no question that there are many other instances that have been verified where fathers who would like to stay and be proper fathers to their children, have found that because of unemployment conditions they cannot provide for those children. And they also found that the only way those children can obtain aid to needy children is for the father to desert his home and family.” *Ibid.*

Similarly, during the brief Senate debates,¹⁰ Senator McCarthy praised the bill as a measure that would reduce the pressure on unemployed fathers to desert, noting that the Special Senate Subcommittee on Unemployment Problems had heard testimony as early

⁹ H.R. 4884, 87th Cong., 1st Sess. (1961).

¹⁰ The Senate Committee on Finance had reported favorably on H.R. 4884, devoting most of the Committee Report to a discussion of amendments not relevant here. S. Rep. No. 165, 87th Cong., 2d Sess. (1961).

as 1959 "from community leaders about fathers deserting their families so that their wife and children would be eligible for ADC benefits." 107 Cong. Rec. 6401 (1961).

c. The following year Congress extended this temporary program, without relevant change, for an additional five years. Act of July 25, 1962, Pub. L. No. 87-543, 76 Stat. 193.¹¹

2. When Congress Enacted Section 407 to Authorize the AFDC-UF Program on a Permanent Basis, It Expressly Limited the Program to the Children of Unemployed Fathers

a. Section 407 was enacted in its present form in 1967 when the AFDC-UF program was authorized on a permanent basis. In contrast to the previous temporary enactments, which had applied to any child deprived of parental support by reason of the unemployment "of a parent,"¹² Section 407 authorizes benefits only for a child deprived of parental support or care by reason of the unemployment "of his father." 81 Stat. 882. Both committee reports stated that the AFDC-UF program "was originally conceived as one to provide aid for the children of unemployed fathers." H.R. Rep. No. 544, 90th

¹¹ The changes made by the 1962 legislation include the addition of provisions denying assistance if the unemployed parent refused without good cause to undergo retraining, and permitting the payment of benefits to both caretaker parents, rather than only the unemployed parent. 76 Stat. 190, 196. See H.R. Rep. No. 1414, 87th Cong., 2d Sess. 14-19 (1962).

¹² See 75 Stat. 75; 76 Stat. 193.

Cong., 1st Sess. 108 (1967); S. Rep. No. 744, 90th Cong., 1st Sess. 160 (1967) (hereinafter "1967 Senate Report"). Noting that some states had adopted plans under the temporary legislation that included "families in which the father is working [and] the mother is unemployed," Congress decided that the permanent legislation should apply "only to the children of unemployed fathers." *Ibid.*

Both the Senate Committee report and the debates demonstrate that Congress did not intend this permanent addition to the AFDC program to displace state programs for general assistance and unemployment relief, and that the principal purpose of Section 407 was the elimination of the structural incentive in the AFDC program that induced paternal desertion. The Senate report stated that "[t]he committee is concerned about the effect that the absence of a State program for unemployed fathers has on family stability. Where there is no such program there is an incentive for an unemployed father to desert his family in order to make them eligible for assistance." *1967 Senate Report, supra*, at 160.

The evidence presented during the Senate hearings on the 1967 legislation revealed that in 19% of the families currently receiving AFDC benefits the father had deserted. *Hearings on H.R. 12080 Before the Senate Comm. on Finance*, 90th Cong., 1st Sess. 254 (1967) (hereinafter "1967 Hearings").¹³

¹³ This figure included both states that had only the AFDC program, and those that had adopted the AFDC-UF program as well. In both 1961 and 1967 the proportion of families

Throughout the debates on the omnibus social security amendments that included Section 407, legislators in both houses described Section 407 as a measure to correct the unintended incentive that the AFDC program had created for paternal desertion. During the debates in the House of Representatives, Representative Ryan explained (113 Cong. Rec. 23096 (1967)):

The fact that, prior to the temporary legislation passed in 1961, the definition of a dependent child require[d] the “continued absence from the home—of the parent” [citation omitted] in effect, forced an unemployed father to “desert” his family if they were to receive payments under this program. The proposed change will eliminate this invidious requirement, and should strengthen family bonds.

In the Senate, debate focused on Section 407 and its function when Senator Harris proposed an amendment making the AFDC-UF program established in Section 407 mandatory for all states. 113 Cong. Rec. 33193 (1967).¹⁴ Harris urged that “the welfare system, itself, in many States encourages the breakdown of families, because it requires that a father in a family, otherwise entitled to aid to families with dependent children, but who is unemployed, leave his

where the father had deserted was less than the national average in those States that had an AFDC-UF program. See pages 30-32, *infra*.

¹⁴ The amendment passed the Senate, 113 Cong. Rec. 33195 (1967), but it was deleted by the Conference Committee. See H.R. Rep. No. 1030, 90th Cong., 1st Sess. 58 (1967); 113 Cong. Rec. 36785 (1967) (Sen. Kennedy).

children and his home so that they may be able to receive assistance.” *Ibid.* Senator Robert Kennedy supported the proposed amendment, arguing that for the past 30 years “[o]ne of the basic problems of the poor has been our welfare program,” which “make[s] it a premium for the father to leave the house.” 113 Cong. Rec. 33194 (1967). Cf. *id.* at 35641-35642 (remarks of Sen. Mondale), 35642 (remarks of Sen. Kennedy).

b. The other provisions of Section 407 underscore its limited function, which was not intended to provide general relief to the children of the unemployed. Section 407(b) established a uniform federal definition of the term “unemployment” that restricted the AFDC-UF plan to families where the father had a substantial recent work history. In contrast to the prior temporary enactment, which left the definition of unemployment to the states, Section 407(b)(1)(C) (i) limited benefits to families where the father had worked six or more quarters during the 13 quarters ending one year prior to his application for benefits,¹⁵ or had been qualified for unemployment compensation within the year prior to his application. Section 407 also excluded from coverage children whose father was receiving unemployment compensation; was not currently registered with the state public employment office, or had refused without good cause a bona

¹⁵ Section 407(d) defined a “quarter of work” as a calendar quarter in which the father either received income of \$50.00 or more or participated in an authorized community work and training program or work incentive program.

fide offer of employment or training. 42 U.S.C. 607 (b)(1)(B), 607(b)(2)(C).

Debate in both houses focused on the question whether these restrictions were consistent with the goal of discouraging paternal desertion. In the House of Representatives, Representative Ryan argued that the exclusion of fathers who did not have a sufficient recent work history or who were receiving state unemployment compensation would undermine this goal (113 Cong. Rec. 23096 (1967)):

[T]he requirement that one must have six or more quarters of work will obviously force those, who are unable to find work, or who have exhausted any community work and training program, to leave their families if AFDC payments are to be received.

* * * * *

Because such a large number of unemployed men have not been in the labor force for a long time, this amendment would exclude those families most in need from assistance unless the father leaves the home. This is clearly inconsistent with the proclaimed goal of the committee—that of strengthening family bonds.

* * * * *

Section 203(a) of the bill which would add subsection (2)(D)(v) to section 407(a) of the act denies assistance to families where the father is in the home and receiving unemployment compensation. This would force a father to leave his family so it would qualify for AFDC payments. This is not only harsh, but it is obviously in-

consistent with the proclaimed policy of the committee favoring family unification.

* * * The father of a family living in a State paying relatively low unemployment compensation may find it to the benefit of his family were he to "desert" so as to make his children eligible for AFDC payments.

Although the Senate passed the House bill with committee amendments deleting the exclusion of unemployed fathers who had no recent work history or who were receiving unemployment compensation,¹⁶ the conferees adopted the more restrictive House version of Section 407. H.R. Conf. Rep. No. 1030, 90th Cong., 1st Sess. 57 (1967). The "restrictive House provisions" were sharply criticized during the Senate debates on the conference committee report on the ground that they would induce fathers to desert (113 Cong. Rec. 36785 (1967) (remarks of Sen. Kennedy)):

These provisions are pernicious. They mean that more fathers will have to leave home in order that their children can obtain aid. They mean more broken families. They mean more broken lives. They mean more children having to grow up without fathers. They mean more juvenile delinquency and additional generations of dependency and tragedy.

In sum, the legislative history reflects a congressional consensus that the function of Section 407 was to eliminate the incentive for unemployed fathers to desert. There was disagreement about how broad

¹⁶ See 1967 Senate Report, *supra*, at 160.

a program Congress should authorize to meet this goal, but there was agreement that the problem at hand depended on the sex of the unemployed parent.

B. THE GENDER DISTINCTION IN SECTION 407 IS CONSTITUTIONAL

1. This Court Has Articulated a Variety of Standards in Gender Diserimination Cases

In *Craig v. Boren*, 429 U.S. 190, 197 (1976), the opinion of the Court identified an intermediate standard of review applicable to claims of gender discrimination, stating that “[t]o withstand constitutional challenge, * * * classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”¹⁷ But as Mr. Justice Powell stated in his concurring opinion (429 U.S. at 210 n.*), “the Court has had difficulty in agreeing upon a standard of equal protection analysis” in cases of gender distinctions. The many opinions in *Craig* and *Califano v. Goldfarb*, 430 U.S. 199 (1977), discuss numerous approaches to the analysis of gender distinctions.

In *Craig* both Mr. Justice Powell and Mr. Justice Stevens filed opinions stating that the Court had not established a special method of scrutiny applicable to gender-based distinctions. Mr. Justice Powell stated that the traditional rational basis standard is still

applicable, although it “takes on a sharper focus when we address a gender-based classification.” 429 U.S. at 211 n.*. In *Craig* and *Goldfarb* Mr. Justice Stevens argued that the Equal Protection Clause “does not direct the courts to apply one standard of review in some cases and a different standard in other cases” (429 U.S. at 211-212) and that courts should assess gender classifications by ascertaining whether they “imply that [one sex is] inferior to [the other]” or “condemn a large class on the basis of the misconduct of an unrepresentative few” or “add to the burdens of an already disadvantaged discrete minority” (430 U.S. at 218). He also emphasized that a classification that is the result of an “actual, considered legislative choice” is quite different from one that is “merely the accidental by-product of a traditional way of thinking about females.” *Id.* at 222-223 & n.9. The opinion of the Court in *Califano v. Webster*, 430 U.S. 313, 317, 320 (1977), can be read as adopting this view.

In *Goldfarb*, Mr. Justice Rehnquist, in an opinion joined by the Chief Justice and Justices Stewart and Blackmun, argued that the standard of review should vary according to the nature of the statute in question and, because of the special nature of comprehensive schemes of social insurance, that cases employing specially rigorous scrutiny should not be “uncritically carried over” “into” the field of social insurance legislation” (430 U.S. at 225). He observed that because modern social insurance legislation typically is a conglomeration of additions to an originally skeletal program, it often lacks the coherence that

¹⁷ See also *Califano v. Webster*, 430 U.S. 313, 316-317 (1977); *Regents of the University of California v. Bakke*, No. 76-811 (June 28, 1978), slip op. 34-37 (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

could be achieved in an omnibus statute enacted at a single time. *Ibid.* And, because social insurance affects large numbers of persons, Congress has a special and legitimate concern about "certainty in determination of entitlement and promptness in payment of benefits." *Ibid.* Consequently, Mr. Justice Rehnquist argued, when dealing with gender distinctions in social welfare legislation the Court should apply the approach of *Mathews v. Lucas*, 427 U.S. 495, 510 (1976), where it upheld a Social Security provision that treated illegitimate children differently than legitimate children, finding that "'the statutory classifications challenged here are justified as reasonable empirical judgments that are consistent with [the legislative] design * * *'" (430 U.S. at 237). See also *Califano v. Webster*, *supra*, 430 U.S. at 321 (Burger, C.J., concurring).

These approaches are not easily reconciled. Perhaps the Court's cases, taken together, establish that no law may be based on sexual stereotypes or stigmatize a person because of sex: the Constitution requires that laws dealing with gender be rationally supported in fact as well as in theory. The legislature cannot justify gender-based distinctions by appeal to administrative concerns or by appeal to assumptions about social roles of the sexes. As one commentator has summarized the recent cases, the laws held to be unconstitutional "shared an important characteristic in terms of impact on behavior: All either prevented, or economically discouraged, departures from 'traditional' sex roles, freezing biology

into social destiny." L. Tribe, *American Constitutional Law* 1065 (1978) (footnote omitted). The Court has upheld laws where the legislative assumptions were borne out in fact (see *Califano v. Webster*, *supra*), or when the statutes, although making some use of gender, ultimately did not discriminate for or against either sex. See *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974). Cf. *Vorcheimer v. School District of Philadelphia*, 532 F.2d 880 (3d Cir. 1976) (en banc), aff'd by an equally divided court, 430 U.S. 703 (1977) (applying the "separate but equal" principle to high schools segregated by sex).

The Court need not essay a definitive answer to these problems in this case, however, and we therefore do not further address the precise nature of the appropriate constitutional test. As we now argue, Section 407 is constitutional, under any of the possible standards, because its results are not gender biased and because it is a considered legislative response to a serious problem.

2. Section 407 Is Constitutional Under Any of the Available Standards

Congress acted within constitutional bounds in enacting Section 407, because the statute's gender distinction responds to the problem the AFDC-UF program was intended to correct, and the resulting distribution of benefits does not discriminate in favor of or against either sex. The distinction was the result of an "actual, considered legislative choice,"

Califano v. Goldfarb, *supra*, 430 U.S. at 223 n.9 (Stevens, J., concurring), designed to correct the proven tendency of the AFDC program to encourage paternal desertion, rather than of congressional reliance on stereotypes. Since the resulting scheme distributes benefits equally to men and women, it does not "add to the burdens of an already disadvantaged discrete minority," *id.* at 218 (Stevens, J., concurring), or "result in the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975).

a. Congress may not justify the use of gender in statutes by invoking "'archaic and overbroad' generalization[s]" such as the notion "that male workers' earnings are vital to the support of their families, while the earnings of female wage earners do not significantly contribute to their families' support." *Weinberger v. Wiesenfeld*, *supra*, 420 U.S. at 643, quoting from *Schlesinger v. Ballard*, *supra*, 419 U.S. at 508. The district court concluded (J.S. App. 30A; footnote omitted) that in enacting the AFDC-UF program Congress acted on the overbroad assumption that fathers generally support their families, and that "mothers in two parent families are not breadwinners, so that loss of their earnings would not substantially affect the families' well-being."

As we have shown, the legislative history demonstrates that Congress did not limit the AFDC-UF program to families with unemployed fathers because

of the stereotyped view that mothers are not bread-winners. The legislative decision rested on evidence that limitation of AFDC benefits to one-parent families induced unemployed fathers to desert their families but did not induce unemployed mothers to desert. The evidence showed, moreover, that paternal desertion was a serious problem, and that a large portion of the AFDC caseload consisted of families where the father had deserted. *1961 Hearings, supra*, at 96-97; *1967 Hearings, supra*, at 254. Many witnesses testified that the AFDC program had the unintended effect of encouraging desertion by unemployed fathers, because once the father left home, the remaining family members would qualify for AFDC benefits. *1961 Hearings, supra*, at 222, 277-280, 328-334, 350, 352, 354, 358, 420, 421. There was no evidence that a significant number of mothers had deserted their families.¹⁸

¹⁸ The district court concluded (J.S. App. 27A) that Congress' primary purpose was the broader goal of "providing financial assistance to families with needy children who are without the support of a breadwinner, and in particular, to those families where the breadwinner becomes unemployed and is unable to provide for their economic well being." As we have shown at pages 13-18, *supra*, when Congress enacted the 1961 temporary law that preceded Section 407 many legislators supported a broadening of the AFDC program. But when Section 407 was adopted in 1967 to authorize the AFDC-UF program on a permanent basis Congress elected not to alter the basic focus of the AFDC program on the special problems of needy children in families where one parent is absent, dead or incapacitated, and it intended the AFDC-UF program to meet the narrow goal of reducing the incentive for parental desertion. The district court's reading of the legislative purpose neglects the difference between the 1961 Act and the 1967 Act.

The evidence available today—from the experience of states with the AFDC-UF program and from research by social scientists—confirms the evidence that was presented to Congress. The rate of paternal desertion decreased in the states that adopted AFDC-UF programs. In 1961, 12 states adopted AFDC-UF programs under the temporary legislation. In 1958 the paternal desertion rate among AFDC families in those states was 21.41%—well above the national average of 18%.¹⁹ By December of 1961, after the adoption of AFDC-UF programs, the rate of paternal desertion among AFDC families in those 12 states fell to 16.78%, while the average desertion rate of paternal desertion for all AFDC families rose to 18.6%.²⁰ In 10 of those 12 states the desertion rate

¹⁹ Division of Program Statistics and Analysis, Bureau of Public Assistance, Social Security Administration, United States Department of Health, Education, and Welfare, Characteristics of Families Receiving Aid to Dependent Children, U.S. Totals, October-December 1958 (Selected State and National Tabulations) Table 3 (October 14, 1959). The 12 states that had adopted AFDC-UF programs by December 1961 are Connecticut, Delaware, Hawaii, Illinois, Maryland, New York, Oklahoma, Pennsylvania, Rhode Island, Utah, Washington, and West Virginia. See note 20, *infra*. The average percentage of desertion for those states was computed by determining the number of families in which the father had deserted in each state from the percentages given for each state, and comparing this number to the total number of AFDC families in those 12 states.

²⁰ Division of Program Statistics and Analysis, Bureau of Family Services, Welfare Administration, United States Department of Health, Education, and Welfare, Characteristics of Families Receiving Aid to Families With Dependent Chil-

fell to below the national average.²¹ In other words, at the same time as the national desertion rate was rising, the rate in AFDC-UF states declined by approximately one-fourth. By December 1967, when 21 states had adopted AFDC-UF programs, the nationwide rate of paternal desertion among AFDC families was 18.1%.²² The paternal desertion rate of 16 of the 21 states participating in the AFDC-UF program was below the national average, and the average rate of paternal desertion among AFDC families in the 21 states, 16.92%, was also below the national average.²³ The average desertion rate in states without AFDC-UF was 20.37%.²⁴

dren, November-December 1961, Table 12 (April 1963). The chart indicates that complete data was not available for Massachusetts, Oregon and Guam. In addition to the 12 states listed in note 19, *supra*, North Carolina had an AFDC-UF program, but less than .05% of its AFDC families participated. *Id.* at n.3. We have not included North Carolina in our calculations.

²¹ *Ibid.*

²² National Center for Social Statistics, Social and Rehabilitation Service, United States Department of Health, Education, and Welfare, Findings of the 1967 AFDC Study: Data By State and Census Division, Part I, Table 22 (July, 1970). The 21 states with AFDC-UF programs were: Massachusetts, Rhode Island, Connecticut, New York, Pennsylvania, Ohio, Illinois, Michigan, Wisconsin, Nebraska, Kansas, Delaware, Maryland, West Virginia, Oklahoma, Colorado, Utah, Washington, Oregon, California, and Hawaii. *Ibid.*

²³ *Ibid.* The average for these states was computed by the procedure used in note 19, *supra*, page 30.

²⁴ No comparable data is available after 1967, because HEW compiled and published complete data only for selected states.

There is also a body of social science research supporting the proposition that paternal unemployment is a major cause of desertion and family dissolution. See, e.g., Aldous, *Wives' Employment Status and Lower-Class Men as Husband-Fathers: Support for the Moynihan Thesis*, 31 J. Marriage & Family 469 (1969); Aldous, *Occupational Characteristics and Males' Role Performance in the Family*, 31 J. Marriage & Family 707 (1969); Hauser, *Demographic Factors in the Integration of the Negro*, 94 Daedalus 847, 867 (1965); Moynihan, *Employment, Income, and the Ordeal of the Negro Family*, 94 Daedalus 745, 761-769 (1965); Rainwater, *Crucible of Identity: The Negro Lower-Class Family*, 95 Daedalus 209 (1965).²⁵ More recent, and more sophisticated, studies show that restriction of AFDC to one-parent families and an increase in payments at a rate faster than increases in average wages strongly contributes to dissolution. See Honig, *AFDC Income, Recipient Rates, and Family Dissolution*, 9 J. Human Resources

²⁵ Much of the scholarly interest was stimulated by a widely circulated 1965 Department of Labor Study—popularly called the Moynihan Report—that documented the close parallels between the unemployment rate among nonwhite males, on the one hand, and both the percentage of nonwhite married women who were separated from their husbands and the number of new AFDC cases opened, on the other hand. Office of Policy Planning and Research, United States Department of Labor, *The Negro Family: The Case for National Action* 13, 21-22, 67-68, 78 (1965). This study also had a significant effect on federal policy. See generally L. Rainwater and W. Yancy, *The Moynihan Report and the Politics of Controversy* (1967).

303 (1974); Ehrenberg & Hewlett, *The Impact of the WIN 2 Program on Welfare Costs and Recipient Rates*, 11 J. Human Resources 219 (1976); Minarik & Goldfarb, *AFDC Income, Recipient Rates and Family Dissolution: A Comment*, 11 J. Human Resources 243 (1976).

In sum, Section 407 addresses a serious flaw in the basic AFDC program. The impetus for the enactment of Section 407 was not an unsupported belief, based on sexual stereotypes, that fathers were more likely than mothers to be breadwinners or to desert their families if they became unemployed. Solid statistical evidence, not stereotypes, supplied the basis for Section 407. There was substantial debate on the question whether the bill should be broadened to apply to other circumstances where the father might have an incentive to desert—such as the situation where he receives unemployment benefits that are too low to provide adequate support for his family. In keeping with the goal of restricting welfare expenditures, Congress enacted the more restrictive House version of the bill, which extended AFDC benefits only to one class of fathers that might be especially subject to the pressure to desert—those who had had a recent and substantial connection with the workforce, or who had received unemployment compensation until recently, and were suddenly unable to support their families.

Congress might have extended AFDC benefits to all needy children whose parents were unemployed, or to all needy children regardless whether their

parents were present or absent, working or unemployed.²⁶ But it chose instead to retain the limited function of the AFDC program, and to authorize states to add the AFDC-UF program only as an adjunct to discourage paternal desertion. As the district court acknowledged (J.S. App. 27A-28A), this is an important government objective. In attaining that objective, Congress was not obliged at the same time to enact a general remedy for unemployment or to fashion a statutory scheme that would encourage unemployed mothers to remain in the home when it had no reason to believe that such encouragement was needed. "Congress could reasonably take one firm step toward the goal of eliminating the hardship caused by * * * [limiting AFDC benefits to one-parent families] without accomplishing its entire objective in the same piece of legislation. * * * Even if it might have been wiser to take a larger step, the step Congress did take was in the right direction and had no adverse impact on persons like [appellees]."
Califano v. Jobst, 434 U.S. 47, 57-58 (1977).

These principles do not lose their force simply because, as the Court reasoned in *Craig* and *Webster*, gender-based classifications must have a "substantial" relationship to an "important" objective. The importance of preventing paternal desertion is ac-

²⁶ In fact, on three occasions Congress has decided not to enact bills that would have expanded the AFDC program to the children of the working poor. See H.R. 16311, 91st Cong., 2d Sess. (1970); S. 1960, 91st Cong., 1st Sess. (1969); S. 2893, 90th Cong., 2d Sess. (1968).

knowledged (J.S. App. 27A); family life is a basic part of our cultural heritage, and governmental action should not cause its dissolution. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (plurality opinion). And the substantiality of the relationship is established by the statistical evidence we have discussed above. A relationship can be substantial even if not perfect. As Mr. Justice Powell explained in *Lalli v. Lalli*, No. 77-1115 (Dec. 11, 1978), even in a case involving classifications based on illegitimacy, which "are invalid * * * if they are not substantially related to permissible state interests" (plurality slip op. 5), the proper "inquiry * * * does not focus on the abstract 'fairness' of a state law, but on whether the statute's relation to the state interests it is intended to promote is so tenuous that it lacks the rationality contemplated by the Fourteenth Amendment" (*id.* at 13). The Court held in *Lalli* that a statute bore a "substantial" relationship to the state's interest where it established an evidentiary rule that served useful purposes and did not "inevitably disqualif[y] an unnecessarily large number of children born out of wedlock" (*ibid.*). The relationship between Section 407 and its objective is much more substantial than the relationship between the statute in *Lalli* and its objective.²⁷ Moreover, Section 407

²⁷ It is thus irrelevant that Section 407 still leaves unemployed fathers with an incentive to desert when both parents are unemployed but the father does not have enough work experience to qualify as "unemployed." That simply shows that Congress did not go as far as it could have gone in eliminating the AFDC program's perverse incentives. It does not

"disqualifies" no one for general assistance, ordinary unemployment benefits, and the like. It was an expanding amendment; as in *Jobst* it "had no adverse impact on persons like [appellees]." 434 U.S. at 58.

b. Perhaps the arguments we have made above would be insufficient to sustain Section 407 if that statute achieved its objectives—however well it did so and however important they are—at the needless expense of women. But the statute does not sacrifice the interests of one sex to those of the other. Indeed, it does not discriminate at all, whether assessed by value of benefits paid or by value of "contributions."

Section 407 unquestionably draws a distinction on the basis of gender: a family in which the father is unemployed is eligible for benefits if it satisfies applicable need tests, but a family in which the mother is unemployed is not eligible, even though its need may be as great as that of the first family. But even though Section 407 draws a distinction between families on the basis of the gender of the parent that is unemployed, the result of applying the statute is not gender-biased. The benefits of the AFDC-UF program are distributed equally to men and women. The AFDC-UF program assists only two-parent families. Section 407 provides for a grant of aid, on the basis of the father's unemployment, that benefits the entire family—a father, a mother,

show that the program it devised in 1967—which eliminates the incentive to desert in an overwhelming proportion of the cases—is not "substantially" related to the important objective of eliminating that incentive.

and one or more children. The grant or denial of aid affects—to an equal degree—one man, one woman, and children of either sex or both sexes.

In contrast, each of the gender-based provisions invalidated by this Court also produced a gender-biased result. In *Reed v. Reed*, 404 U.S. 71 (1971), a state statute required that males be preferred over females who were equally qualified to administer an estate. In *Stanton v. Stanton*, 421 U.S. 7 (1975), and *Craig v. Boren*, *supra*, state statutes establishing a higher age of majority for males and allowing females to purchase beer at a younger age were held to violate the Equal Protection Clause. Finally, a trio of cases, *Frontiero v. Richardson*, 411 U.S. 677 (1973), *Weinberger v. Wiesenfeld*, *supra*, and *Califano v. Goldfarb*, *supra*, involved gender distinctions superficially similar to Section 407, in that each allocated benefits on the basis of the beneficiary's familial relationship to a federal employee or a wage earner covered by social security. But in each of those cases the vice of the statutory provision was not simply that it drew a distinction on the basis of gender, but rather that the gender distinction produced an unequal division of benefits between men and women that did not serve any substantial governmental interest.

Frontiero, *Wiesenfeld*, and *Goldfarb* each involved a claim that a female employee was receiving less compensation than a male employee or that her family received less favorable benefits than the families of male wage earners who paid the same amount of

social security taxes. The result of applying the statutory gender distinction in each of those cases was gender-biased. The effect of the statute challenged in *Frontiero* was to deny servicewomen the same compensatory fringe benefits for their spouses that servicemen received. As a result, "females with nondependent husbands were effectively denied equal compensation for equal efforts." *Goldfarb, supra*, 430 U.S. at 241 (Rehnquist, J., dissenting). In *Wiesenfeld* and *Goldfarb* "female workers [were] required to pay social security taxes producing less protection for their families than [was] produced by the efforts of men." *Wiesenfeld, supra*, 420 U.S. at 645; see *Goldfarb, supra*, 430 U.S. at 206-207.

The rationale of these cases, as Mr. Justice Brennan concluded for a plurality of the Court in *Goldfarb*, is that "benefits 'directly related to years worked and amount earned by a covered employee, and not to the need of the beneficiaries directly,' like the employment-related benefits in *Frontiero*, 'must be distributed according to classifications which do not without sufficient justification differentiate among covered employees solely on the basis of sex.'" 430 U.S. at 212, quoting from *Wiesenfeld, supra*, 420 U.S. at 647. *Frontiero*, *Wiesenfeld*, and *Goldfarb* thus hold that benefits distributed as compensation for work, or in relation to the contributions of covered employees, may not be distributed on an unequal basis to men and women unless the inequality is justified by sufficient governmental interests.

Section 407 does not violate the principle established in those cases because the gender distinction does not result in any unequal distribution of benefits to men and women.²⁸ More than that, Section 407 does not give unequal weight to contributions. The AFDC program—unlike the compensatory or contributory programs in *Frontiero*, *Wiesenfeld*, and *Goldfarb*—is a non-contributory welfare program for the aid of dependent children. The AFDC program also permits the payment of benefits to caretaker relatives²⁹ and one or (under AFDC-UF) both parents. But AFDC benefits are in no sense either payment for either parent's past employment or intended as unemployment compensation. AFDC benefits are not based on the taxes or contributions paid by either parent. Except in a very loose way, they are not based on length of prior employment. Accordingly, although the benefits are not available to a family when the mother (but not the father) is unemployed,

²⁸ To the extent there is any sex-biased effect, the AFDC program as a whole favors women. In 1975 (the most recent year for which HEW has published statistics), a natural or adoptive mother was present in 91.1% of all AFDC families, and more than 90% of those mothers received a portion of the AFDC grant. In contrast, in the same year a natural or adoptive father, or a legally responsible stepfather, was present in only 10% of AFDC families, and only 73% of those fathers received part of the AFDC grant. Office of Research and Statistics, Social Security Administration, United States Department of Health, Education, and Welfare, *Aid to Families With Dependent Children in 1975 Recipient Characteristics Study*, Pt. 1, 3-4 (1977).

²⁹ See 42 U.S.C. 606(b).

Section 407 does not deny female employees the same compensation paid to male employees or diminish the value of taxes previously paid by mothers. In sum, the AFDC-UF program does not denigrate "the efforts of women who do work and whose earnings contribute significantly to their families' support." *Wiesenfeld, supra*, 420 U.S. at 645.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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FEBRUARY 1979

APPENDIX

Section 407 of the Social Security Act, 75 Stat. 75, as amended, 42 U.S.C. 607, provides:

(a) The term "dependent child" shall, notwithstanding section 606(a) of this title, include a needy child who meets the requirements of section 606(a)(2) of this title who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father, and who is living with any of the relatives specified in section 606(a)(1) of this title in a place of residence maintained by one or more of such relatives as his (or their) own home.

(b) The provisions of subsection (a) of this section shall be applicable to a State if the State's plan approved under section 602 of this title.

(1) requires the payment of aid to families with dependent children with respect to a dependent child as defined in subsection (a) of this section when—

(A) such child's father has not been employed (as determined in accordance with standards prescribed by the Secretary) for at least 30 days prior to the receipt of such aid,

(B) such father has not without good cause, within such period (of not less than 30 days) as may be prescribed by the Secretary, refused a bona fide offer of employment or training for employment, and

(C) (i) such father has 6 or more quarters of work (as defined in subsection (d)(1) of this section) in any 13-calendar-quarter period ending within one year prior to the application for such aid or (ii) he received unemployment compensation under an unemployment compensation law of a State or of the United States, or he was qualified (within the meaning of subsection (d)(3) of this section) for unemployment compensation under the unemployment compensation law of the State, within one year prior to the application of such aid; and

(2) provides—

(A) for such assurances as will satisfy the Secretary that fathers of dependent children as defined in subsection (a) of this section will be certified to the Secretary of Labor as provided in section 602(a)(19) of this title within thirty days after receipt of aid with respect to such children;

(B) for entering into cooperative arrangements with the State agency responsible for administering or supervising the administration of vocational education in the State, designed to assure maximum utilization of available public vocational education services and facilities in the State in order to encourage the retraining of individuals capable of being retrained; and

(C) for the denial of aid to families with dependent children to any child or relative specified in subsection (a) of this section—

(i) if, and for so long as, such child's father is not currently registered with the public employment offices in the State, and

(ii) with respect to any week for which such child's father receives unemployment compensation under an unemployment compensation law of a State or of the United States.

(c) Notwithstanding any other provisions of this section, expenditures pursuant to this section shall be excluded from aid to families with dependent children (A) where such expenditures are made under the plan with respect to any dependent child as defined in subsection (a) of this section, (i) for any part of the 30-day period referred to in subparagraph (A) of subsection (b)(1) of this section, or (ii) for any period prior to the time when the father satisfies subparagraph (B) of such subsection, and (B) if, and for as long as, no action is taken (after the 30-day period referred to in subparagraph (A) of subsection (b)(2) of this section), under the program therein specified, to certify such father to the Secretary of Labor pursuant to section 602(a)(19) of this title.

(d) For purposes of this section—

(1) the term "quarter of work" with respect to any individual means a calendar

quarter in which such individual received earned income of not less than \$50 (or which is a "quarter of coverage" as defined in section 413(a)(2) of this title), or in which such individual participated in a community work and training program under section 609 of this title or any other work and training program subject to the limitations in section 609 of this title, or the work incentive program established under part C;

(2) the term "calendar quarter" means a period of three consecutive calendar months ending on March 31, June 30, September 30, or December 31; and

(3) an individual shall be deemed qualified for unemployment compensation under the State's unemployment compensation law if—

(A) he would have been eligible to receive such unemployment compensation upon filing application, or

(B) he performed work not covered under such law and such work, if it had been covered, would (together with any covered work he performed) have made him eligible to receive such unemployment compensation upon filing application.

Supreme Court, U. S.
FILED

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MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM 1978

No. 78-437

JOSEPH A. CALIFANO, Secretary of Health,
Education, and Welfare,

v.

Appellant,

CINDY WESTCOTT, et al.,

Appellees.

No. 78-689

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Massachusetts Department of Public Welfare,

v.

Appellant,

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Appellees.

**ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS**

**BRIEF FOR THE INDIVIDUAL AND CLASS
APPELLEES**

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P.L. 90-248, § 204(a), 81 Stat. 889,	36, 42
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107 Cong. Rec. 3761 (1961)	28, 31, 41
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113 Cong. Rec. 36924 (1967)	44

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Division of Program Statistics and Analysis; "Study of Recipients of Aid to Families With Dependent Children, November-December, 1961: National Cross Tabulations (1965)	56
SRS National Center for Social Statistics, Report AFDC-3 (67), "Findings of The 1967 AFDC Study": Data by State and Census Division (1970)	56
SRS, National Center for Social Statistics, Report A-2, <i>Public Assistance Statistics</i> , Jan.-Dec. 1974, 1977, Tables 5	71
SRS, National Center for Social Statistics, Report A-2, <i>Public Assistance Statistics</i> , Jan.-Dec. 1975, Table 5	71
SRS, National Center for Social Statistics, Report A-2, <i>Public Assistance Statistics</i> , (TABLE): AFDC Segment...[1975-1977] ...	65
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U.S. Dept. of Justice, Interim Report to the Presi- dent, Task Force on Sex Discrimination, Civil Rights Division (October 3, 1978)	23
U.S. Dept. of Labor, BLS, Special Labor Force Report 208, "Labor Force Trends: A Synthesis and Analysis and a Bibliography" (October, 1977).	50

	Page
U.S. Dept. of Labor, BLS, Marital and Family Characteristics of the Labor Force, March 1978 (July 24, 1978).....	50
U.S. Dept. of Labor, Employment Standards Adm., Women's Bureau, "Women With Low Incomes" 1-3, (November, 1977).....	19
U.S. Dept. of Labor, Employment Standards Adm., Women's Bureau, "Why Women Work" (Aug. 1978 revised)	50
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IN THE

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No. 78-437

JOSEPH A. CALIFANO, Secretary of Health,
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v.

Appellant,

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*Appellees.***No. 78-689**

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v.

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Appellees.

**ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS**

**BRIEF FOR THE INDIVIDUAL AND CLASS
APPELLEES**

OPINION BELOW

The April 20, 1978 opinion of the District Court (U.S. J.S. App. 1A-37A) which is the basis for the appeal in No. 78-437 has now been reported at 460 F. Supp. 737 (D. Mass. 1978). The August 9, 1978 order of the District Court (State U.S. App. 13a-14a) which is the basis for the appeal in No. 78-689 has not been reported.

QUESTIONS PRESENTED

In No. 78-437

Whether Section 407 of the Social Security Act, which authorizes payments of subsistence benefits to needy two-parent families with children deprived of parental support or care by reason of the unemployment of a father, but not by reason of the unemployment of a mother, violates the Due Process Clause of the Fifth Amendment.

In No. 78-689

If the answer to the prior question is yes, whether the appropriate remedy is extension of benefits to the excluded class of needy families with unemployed mothers, invalidation of the AFDC-U program resulting in termination of aid to hundreds of thousands of needy children and their parents, or a legislative restructuring of the AFDC-U program by this Court

to impose a principal wage earner test, terminate some current recipients, and extend benefits to some of those now impermissibly excluded.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

No person shall be . . . deprived of life, liberty or property, without due process of law.

Section 407 of the Social Security Act, 42 U.S.C. 607, sets out the gender classification at issue herein as follows:

(a) The term "dependent child" shall . . . include a needy child . . . who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father. . . .

The full text of section 407 is set out in the Appendix to the Brief for the Appellant in No. 78-437 (hereinafter U.S. Brief).

STATEMENT OF THE CASE

This class action challenges the constitutionality of the gender classification in the federal-state Aid to Families With Dependent Children of Unemployed Fathers (AFDC-U) program, an optional sub-program of the Aid to Families With Dependent Children

(AFDC) program. Under the AFDC-U program, federal matching funds are available for state AFDC payments to needy families with children "deprived of parental support or care by reason of the unemployment . . . of [the] father," section 407(a) of the Social Security Act, 42 U.S.C. § 607(a).¹ Matching funds are not provided to families made needy by reason of the unemployment of the mother. Section 403 of the Social Security Act, 42 U.S.C. § 603. Families who are eligible for AFDC-U may be provided medical assistance benefits under the federal-state Medicaid program whether or not they are actually receiving AFDC-U benefits, and participating states receive federal matching funds for the costs of such Medicaid benefits. Section 1902(a)(10) of the Social Security Act, 42 U.S.C. § 1396a(a)(10). Federal matching funds are not available for Medicaid payments on behalf of needy families deprived of parental support or care because of a mother's unemployment.

Massachusetts participates in the AFDC program and is one of 28 states (including the District of Columbia and Guam,² which has elected to participate in

¹ To be "unemployed" under § 407 and implementing federal regulations the father must satisfy the various federal criteria set out at note 57, *infra*. In addition, he must show that his family's countable income and resources are within the state's standard of need. See 45 C.F.R. § 233.20. In every case there must be an individualized determination of "unemployment" and "need."

² 42 Soc. Sec. Bull. 78 (1979).

the AFDC-U program.³ Massachusetts also participates in the Medicaid program.⁴ Accordingly, the federal government reimburses Massachusetts for 50% of its AFDC and Medicaid costs (A.13, 34).

Appellees Cindy and William Westcott reside in Springfield, Massachusetts with their infant son. Since 1972 Cindy Westcott has held various full-time and part-time jobs as a waitress, store clerk, tobacco picker and chambermaid. Her last position as a chambermaid, at which her weekly take-home pay was about \$50, ended in November 1976. William Westcott has an 8th grade education. As of November 1976 his employment history consisted of intermittent work during 1976 at odd jobs such as unloading trucks and chopping trees and a two month position funded by the federal Comprehensive Education and Training Act (CETA), 29 U.S.C. 801 (A.38).

In November 1976 the Westcotts applied to the Massachusetts Dept. of Public Welfare for public assistance and were found ineligible because William Westcott did not have enough quarters of prior work to meet the federal-state AFDC-U definition of un-

³ 6 CHSR III, sub. A, § 301.03; §§ 303.01, 303.04. (A.22-26); Mass. Gen. Laws Ann. ch. 19, § 10; ch. 118, § 1.

⁴ In addition to providing Medicaid to families who receive AFDC and AFDC-U, the state has also opted to provide Medicaid to families who are eligible for AFDC and AFDC-U, but who have not applied for benefits. See 45 C.F.R. § 248.1(a)(1) and (c); Mass. Public Assistance Policy Manual, Ch. I, Section F, Subd. 2a.

employment (A.39).⁵ Although Cindy Westcott did satisfy the requirement, her prior work history did not entitle the family to AFDC-U benefits because AFDC-U is available only to families in which the father satisfies the test of unemployment. Had the family been found eligible, it would have been entitled to \$272.10 in benefits (A.15).

Appellees Susan and John Westwood reside in Plainfield, Massachusetts with their young son. Susan Westwood has worked to support herself and her family since 1972 as a part-time bookkeeper at a medical services facility. When this lawsuit was filed she was working ten to fifteen hours a week and earning a weekly takehome pay of \$66. From January 1973 until the filing of this lawsuit, John Westwood's only employment consisted of intermittent logging and maple sugaring (A.39-40).

In February 1977 the Westwoods applied for Medicaid benefits as a family eligible for, but not receiving, AFDC-U benefits. They were found ineligible because John Westwood did not have enough quarters of work to satisfy the AFDC-U definition of unemployment (A.40).⁶ Although Susan Westwood did satisfy the requirement because she was working less than 100 hours a month, see note 57, *infra*, her prior work history did not entitle the family to Medicaid

⁵ The Westcots were orally informed that they were ineligible for state funded general relief (A.39).

⁶ The Westwoods' son received Medicaid as a needy individual under 21 (A.40).

benefits because of the limitation of such benefits to families in which the father meets the test of unemployment.

This lawsuit was filed in January 1977 on behalf of the Westcott family. In February 1977 the Westwood family was added as plaintiffs. The case was brought as a class action on behalf of those two-parent Massachusetts families with dependent children who would be eligible for AFDC-U and hence Medicaid benefits but for the gender limitation in § 407 and the implementing state regulations. The Secretary of HEW, who is charged with the federal administration of the AFDC and Medicaid programs, and the Commissioner of the Massachusetts Department of Public Welfare, who is charged with the state administration of AFDC and Medicaid, were named as defendants. The plaintiffs sought declaratory and injunctive relief, alleging that the gender classifications in § 407 and the state regulations which deny AFDC-U and Medicaid benefits to needy families in which the mother is unemployed violate their rights to equal protection of the laws under the Due Process Clause of the Fifth Amendment and the Fourteenth Amendment.

After this lawsuit was filed, attorneys for plaintiff and the State defendant entered into stipulations whereby the State defendant would consider the Westcots' and Westwoods' eligibility for AFDC-U and Medicaid respectively in light of Mrs. Westcott's and Mrs. Westwood's ability to satisfy the definition of unemployment except for the requirement that the

unemployment be that of the male parent. Both families were found eligible and awarded benefits pending resolution of their claims (A.28, 37, 39, 40).

On April 20, 1978 the District Court certified the class and on plaintiffs' motion for partial summary judgment on their federal constitutional claims and the federal defendant's cross motion for summary judgment held that section 407 and the state regulations discriminated solely on the basis of sex in violation of plaintiffs' rights to equal protection under the Fifth and Fourteenth Amendments respectively. The Court concluded that the gender classification was based on an "archaic and overbroad" generalization, similar to that invalidated by this Court in *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), that mothers in two-parent families are not breadwinners so that the loss of their earnings would not substantially deprive their families (U.S.J.S. at 29a-30a). It also determined that the gender discrimination did not fairly serve the important legislative objectives of providing aid to needy families deprived of a breadwinner's support and promoting family stability (*Id.* at 23a, 26a-28a).

The court agreed with the parties that extension of benefits to the class rather than invalidation of the AFDC-U program was the appropriate remedy (*Id.* at 34a-37a). Accordingly, the court's April 20, 1978 order enjoined the state defendant from refusing to provide AFDC and Medicaid benefits to families deprived by the unemployment of a mother in the same

amounts and under the same standards as he provides such benefits to families deprived because of the father's unemployment. Moreover, operation or enforcement of § 407 was enjoined insofar as it prohibited approval of a state plan or payment of federal matching funds to Massachusetts for AFDC and Medicaid benefits on behalf of families deprived because of the mother's unemployment (*Id.* at 40a-42a).

By motion of June 7, 1978 the state defendant sought clarification or amendment of the District Court's April 20, 1978 order to permit it to impose a principal wage earner test which it had devised (State J.S. App. 6a-11a). Plaintiffs opposed the motion. HEW did not take a position on the state's motion in the district court. However, in response to the state's submission of a proposed amendment to its AFDC state plan to adopt a principal wage earner test, the HEW Regional Office advised the state on July 11, 1978 that such a test was not permissible (A.57-65).

During this time period William Westcott obtained his first full-time employment as a night watchman at the minimum wage. As a result, the State indicated that the Westcotts would not be eligible for further benefits if Massachusetts were able to apply its principal wage earner test since Cindy Westcott, still unemployed, would no longer meet the test for principal wage earner. The result would have been that William Westcott's disposable income after work expenses

would have been less than the amount of AFDC-U benefits the family was receiving.⁷

On August 9, 1978, the District Court denied the state's motion, noting that any restructuring of the AFDC-U program beyond the extension ordered on April 20, 1978 should be left to Congress (State J.S. App. 13a-14a).

This case is now before the Court in No. 78-437 on the direct appeal by the Secretary of HEW from the April 20, 1978 decision holding § 407 unconstitutional, and in No. 78-689 on the direct appeal by Massachusetts from the August 9, 1978 decision barring the imposition of a principal wage earner eligibility test.

SUMMARY OF THE ARGUMENT

The District Court held that the gender classification in section 407 of the Social Security Act, under which subsistence AFDC-U benefits are provided to two-parent families made needy by the father's unemployment but not to identically situated females made needy by the mother's unemployment, constituted impermissible discrimination on the basis of sex in violation of the due process clause of the Fifth Amendment. The court ordered that benefits be ex-

⁷ Plaintiffs' Notice of Massachusetts' Planned Action to Terminate the Westcott's AFDC-U and Medicaid Because of Mr. Westcott's Employment . . ., July 28, 1978, pp. 3-4. The Westcotts were able to continue to receive partial AFDC-U benefits to supplement William's wages pursuant to the stipulation entered into by the plaintiffs and the State.

tended to families made needy when either parents, without regard to sex, became unemployed as defined by the Act and regulations. This decision is completely consistent with the prior decisions of this Court, the legislative history of the Act, and Congressional policies underlying the AFDC-U program, and should therefore be affirmed.

I

A

Section 407 of the Social Security Act discriminates against unemployed female wage earners by permitting a male wage earner to qualify himself and his family for AFDC-U and Medicaid benefits by showing he is unemployed and needy, while denying an identically situated female wage earner the same opportunity to qualify herself and her family for benefits. As this Court's decisions make clear, such denial of benefits to some and not to other two-parent families on the basis of the sex of the spouse claiming benefits is clear sex discrimination. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677 (1973).

Since section 407 is unquestionably gender-based and gender-biased, the standard against which the denial of benefits to unemployed female wage earners must be tested is that applied in prior gender discrimination cases and most recently reiterated in *Orr v. Orr*, No. 77-1119 (March 5, 1979), Slip. Op. p. 10: "[C]lassifications by gender must serve important

governmental objectives and must be substantially related to achievement of those objectives."

B

The objective of the AFDC-U program is to aid families deprived of support because of a breadwinner parent's unemployment. Prior to 1961, AFDC benefits were provided only to children made needy by reason of the absence, death, or incapacity of a parent. Congress recognized in 1961 that families could be equally needy when a parent became unemployed, and therefore adopted section 407 to provide aid on a gender neutral basis to families deprived because of the unemployment of a parent. When Congress made the AFDC-U program under section 407 permanent in 1967 it confirmed its objective of meeting children's needs caused by unemployment, but imposed a federal definition of employment to make implementation more uniform throughout the country.

In both 1961 and 1967 Congress had generally discussed the role of parents as providers in sex stereotypical terms, with the father as breadwinner and the mother as a non-breadwinner homemaker. While the legislative history is far from clear, it appears most likely that Congress adopted the gender distinction in section 407 in 1967 on the basis of this stereotype since Congress had determined to assure only past breadwinners should be able to qualify for aid on the basis of their unemployment.

What is clear, however, is that neither section 407 nor its gender classification were adopted, as the Solicitor General argues, to serve a Congressional objective of reducing father desertion among poor families. While Congressional and Administration proponents of an expanded AFDC program sometimes claimed that such expansion would have the desirable incidental effect of reducing desertion incentives, the legislative history shows that Congress adhered to meeting the needs of the children of the unemployed as the objective of section 407. Indeed, the Solicitor General's argument finds no support in the Act, committee reports, or statements of bill managers or sponsors, and relies almost entirely, particularly in 1967, on the words of the bill's opponents. Moreover, the Solicitor ignores the adoption of two provisions related specifically to addressing the problem of desertion, both of which were sex-neutral.

C

The gender classification in section 407 is a constitutionally impermissible way to serve the objective of aiding two-parent families in need because of unemployment. In failing to protect needy families against the unemployment of a wage earner mother, Congress acted on the "archaic and overbroad" generalization, that fathers but not mothers contribute vitally to their families' support, which this Court condemned as unconstitutional in *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975). The gender classification in section

407, denigrates the efforts of women who do work to support their families, and is irrelevant to a determination of whether there has been a deprivation of *parental* support caused by unemployment. Indeed, the Solicitor General virtually concedes that the gender classification in section 407 must fall if it rests on Congressional assumptions that women are not wage earners, and it most assuredly does.

Classifications based on stereotypes about gender roles are invidious not because statistics do not back up the stereotype, for often they do, but because they penalize individual men and women whose behavior does not fit the stereotypical mold. Current statistics demonstrate that married women with children are participating significantly in the labor force and that their earnings are vital to their families. There is no valid basis for denying AFDC-U benefits to these mothers as a class when they become unemployed.

D

The Solicitor General argues, however, that Congress adopted the gender classification because its objective with respect to section 407 in 1967, indeed its only objective, was to correct a structural flaw in the AFDC program under which a parent could qualify a family for AFDC benefits by deserting. In addition, Congress addressed only desertion by fathers, since fathers deserted more frequently than mothers.

This argument fails for two reasons. First, even if Congress did have an objective for section 407 related

to desertion, which we dispute, surely that objective was to keep both parents, not just the father, at home. Surely the gender classification does not serve that sex-neutral objective, and the Solicitor General does not argue otherwise.

Second, even if the Congressional objective were to eliminate the alleged incentive for *fathers* to desert, such a gender-based purpose, as this Court recently recognized in *Orr v. Orr, supra*, cannot sustain the statute. The decision not to aid unemployed mothers since they are less likely deserters is based on overbroad generalizations that unemployed mothers, "the center of home and family life," will remain with their families during bad times while unemployed fathers will flee unless they are financially rewarded. By denying unemployed mothers the financial support that is provided to men to enable them to remain at home, Congress has denied mothers the equal protection of the law secured by the Fifth Amendment.

II

A

The District Court correctly ordered that AFDC-U benefits be extended to families in which the unemployed mother satisfies all of the conditions of section 407. The Solicitor General agrees that extension is the appropriate remedy if the gender classification is found unconstitutional.

Extension is consistent with the Social Security Act's separability clause, 42 U.S.C. § 1303, and with

this Court's decisions uniformly extending Social Security Act benefits when a provision of the Act has been found unconstitutional. See, e.g., *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Weinberger v. Wiesenfeld*, *supra*. Invalidation would cause irreparable harm to over half a million individuals, mostly children, currently receiving AFDC-U. Extension would protect these children and allow Congress to make any necessary adjustments in the program. Moreover, since AFDC-U is optional with the states, any state unsatisfied with the additional coverage resulting from extension could drop out of the program.

Extension is also consistent with the history, purposes, and structure of AFDC-U. With the exception of the 1967 change in section 407, the AFDC program has been gender neutral since 1935. Extension would remove this one exception. Contrary to Appellant Sharp's arguments, extension would not represent a fundamental shift to a guaranteed income to the working poor, for a parent would still have to satisfy all the AFDC-U eligibility requirements including the complex federal definition of unemployment.

The extra cost of extension surely does not show that Congress would prefer invalidation of the AFDC-U program. Even if the cost estimates proffered for purposes of this lawsuit are accepted, and there is good reason to doubt them, the increase would be only a percentage or two above current AFDC expenditures. In any event, as Appellant Sharp noted

below, Congress did not add the gender classification in 1967 for cost reasons.

B

Appellant Sharp's argument that this Court should avoid the choice of extension or invalidation, and should instead restructure the program by adopting a "principal wage earner model," must be rejected.

A principal wage earner test is inconsistent with the language, structure and history of the Act. The effect of such a test would be to deny aid to 29% of those currently eligible, a result contrary to 42 U.S.C. § 1303 which preserves benefits to eligible recipients when a provision of the Act as applied to others is invalidated, to 42 U.S.C. § 1304, which reserves to Congress the power to alter or amend the Act, and to 42 U.S.C. § 602(a)(10), which guarantees benefits to all who fit within the federal statutory standards. Moreover, a principal wage earner test has never been used by Congress to determine AFDC eligibility under section 406(a) or AFDC-U eligibility under section 407. In addition, as the Solicitor General points out, Massachusetts could not implement a principal wage earner test under controlling federal regulations now in effect.

These arguments are confirmed, not refuted, by the 1961 legislative history of section 407 on which Appellant Sharp relies. That history does not show that Congress wanted to exclude two-worker families, but

only that Congress was largely unaware of women's role as family supporters. There is no indication that in 1967 the gender classification was added to impose a principal wage earner test.

A principal wage earner test must also be rejected because this Court lacks the authority under Article III and the competence to resolve the many important policy issues involved in a principal wage earner test. These include the appropriate definition of a principal wage earner, the treatment of currently eligible families who would otherwise be terminated, and the political question of whether such a test should be adopted since it would fall most heavily on women workers who have long suffered economic discrimination. Resolution of these issues is appropriately left to Congress.

I

SECTION 407 DISCRIMINATES AGAINST UNEMPLOYED FEMALE WAGE EARNERS IN VIOLATION OF THE FIFTH AMENDMENT

A. Section 407 Discriminates Against Female Wage Earners By Denying Them and Their Families Financial and Medical Assistance Desperately Needed During Their Unemployment; The Heightened Scrutiny Applied in Prior Gender Discrimination Cases is Therefore Appropriate.

There is no dispute that section 407 entails a gender classification. (U.S. Brief in No. 78-437 at 36) (herein-

after U.S. Brief). Under the statute a father can qualify himself, his spouse and his dependent children for AFDC-U and medical benefits to sustain them during the crisis of his unemployment by showing that he is both unemployed within the federal definition, and needy. A mother who becomes unemployed cannot qualify herself, her spouse or her children for the same benefits because she is absolutely denied the opportunity of showing that she is unemployed and needy.

The message to the unemployed woman is clear: the government regards as worthless her work efforts to raise her family out of poverty. It denies that her unemployment is as much of a calamity for her family, which has depended upon her earnings to buy the groceries and pay the rent, as is the unemployment of a father. Rather, at the moment of crisis, the government intervenes through section 407 only on behalf of needy unemployed fathers to replace the income lost by their unemployment, but it ignores the identical plight of a needy unemployed mother.⁸

⁸ For the unemployed women who have most likely had unskilled and low paying jobs, the denial of AFDC-U when they lose their jobs is only a "heaping on" of the economic disadvantages long endured by all women, but in particular by poor women. *Frontiero v. Richardson*, 411 U.S. 677, 689 n. 22 (1973). Thus, women generally have lower incomes than men because they are more likely to hold dead end jobs. They are plagued by a higher unemployment rate than men and sex discrimination inhibits them from taking full advantage of job market opportunities. As a result, women are more likely to be poor than men. "Women With Low Incomes," U.S. Dept. of Labor, Employment Standards Adm., Women's Bureau, 1-3 (November, 1977).

Even though the Solicitor acknowledges that § 407 contains a gender classification, he claims that this classification does not operate "at the needless expense of women," U.S. Brief at 36, because there is a father and a mother present in every family which receives, or which is denied, AFDC-U benefits. This Court has uniformly struck down gender classifications that result in benefits being granted or denied to families on the basis of the sex of the qualifying parent, however.

In *Frontiero v. Richardson*, 411 U.S. 677 (1973), for example, some families received an added quarters allowance, while others did not. Both types of families consisted of husbands and wives, but the disqualified families were always the families in which the wife was the spouse in the military service. This Court did not even stop to consider whether or not this was discriminatory; the only issue was whether the discrimination was constitutionally justifiable. Similarly, this Court has summarily affirmed a holding that the distribution of Social Security benefits to husband-wife families in different amounts, based solely on the sex of the spouse's earnings record which was qualifying the family, was unconstitutional. *Califano v. Jablon*, 430 U.S. 924 (1975), summarily affirming 399 F. Supp. 118 (D. Md. 1975).⁹

⁹ The District Court had observed: "The Government has at no time during the course of this litigation denied that [the sections at issue] discriminate between male and female spouses of covered wage earners on the basis of sex and on that basis alone." *Jablon v. Secretary of HEW*, 399 F. Supp. 118, 125 (D. Md. 1975).

Even in cases in which only one spouse has survived, the Court has focused upon the impact on the family. Thus, in *Weinberger v. Wiesenfeld*, 420 U.S. 636, 651 (1975), the Court struck down a classification which discriminated among surviving children on the basis of the sex of the parent who would be available to stay home with the children. In *Califano v. Goldfarb*, 430 U.S. 199, 209 (1977), the Court found that discrimination against "one particular category of family" on the basis of the sex of the spouse with Social Security coverage is impermissible.

The Solicitor General also argues that gender discrimination does not exist here because AFDC-U is a public assistance program. The distribution of social security benefits or fringe benefits solely on the basis of sex of the qualifying spouse favors one spouse over another, he says, but the distribution of subsistence benefits on the basis of the sex of the qualifying spouse does not. (U.S. Brief, p. 39).

There is no basis for concluding that sex discrimination is present in the case of Social Security benefits or fringe benefits but not AFDC-U benefits, however. The mothers being denied subsistence AFDC-U benefits for their families have worked in the past just as much as the men who qualify. Moreover, the benefits being denied are not simply employment related fringe benefits (as in *Frontiero v. Richardson*, *supra*) or non-need based Social Security benefits (as in *Weinberger v. Wiesenfeld*, *supra*), but public assistance benefits available as a last resort for parents hit by

unemployment and otherwise unable to provide basic necessities for their children and themselves. Cf. *Nyquist v. Mauclet*, 432 U.S. 1, 13, (1977) (Burger, C.J. dissenting) (distinguishing the denial of higher education benefits to certain aliens from the ". . . denial of welfare benefits essential to sustain life. . . .") (emphasis in original).¹⁰ Surely there could be no greater "denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support," *Weinberger v. Wiesenfeld*, *supra*, at 645, than to deny subsistence benefits based on past work efforts at the moment of crisis.

The harm caused to these women and their families by denial of subsistence benefits, not just fringe benefits or non-need based Social Security benefits, is compounded by two further considerations. First, more people in a family are adversely affected. It is not just the woman herself, as in *Reed v. Reed*, 404 U.S. 71

¹⁰ Indeed, this Court has held that the statutory entitlement under a public assistance program creates such a great personal interest that the most rigorous due process standards are applied, while the procedural requirements under aspects of the Social Security program or federal employment may be less rigorous. Compare *Mathews v. Eldridge*, 424 U.S. 319, 340 (1976) (Social Security disability benefits) and *Arnett v. Kennedy*, 416 U.S. 134 (1974) (federal employment) with *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) ("Thus the crucial factor in this context—a factor not present in the case of the blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose governmental largesse is ended—is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits.")

(1971), not just she and her spouse, as in *Frontiero v. Richardson*, *supra*, but the entire family including children which suffers from the denial of AFDC-U, making this case most akin to *Weinberger v. Wiesenfeld*, *supra*. Second, section 407 flatly denies all women the opportunity to qualify their families for AFDC-U, in contrast to gender classifications which only imposed proof of dependency requirements on the spouse of a female wage earner. *Frontiero v. Richardson*, *supra*; *Califano v. Goldfarb*, *supra*, 430 U.S. at 224 (1977) (Rehnquist, J. dissenting and distinguishing *Weinberger v. Wiesenfeld*, *supra*).

The Solicitor's argument that the classification here is not gender-biased is finally put to rest by the Solicitor's colleagues. A Department of Justice task force considering this matter in a non-adversarial context has now advised the President that section 407 "overtly and substantively discriminates against women." Task Force on Sex Discrimination, Civil Rights Division, U.S. Dept. of Justice, Interim Report to the President, 155 (October 3, 1978) (emphasis supplied). Surely this is correct.¹¹

Since section 407 so clearly "provides that different treatment be accorded . . . on the basis of . . . sex; it

¹¹ Moreover, the two other District Courts which have rendered opinions on this issue have concluded that § 407 discriminates on the basis of gender. See *Stevens v. Califano*, 448 F. Supp. 1313 (N.D. Ohio 1978), appeal docketed *Califano v. Stevens*, No. 78-449 (U.S. Supreme Court); *Browne v. Califano*, Civ. Act. No. 77-1249 (E.D. Pa. June 9, 1978), appeal docketed *Califano v. Browne*, No. 78-603 (U.S. Supreme Court).

thus establishes a classification subject to scrutiny under the Equal Protection Clause." *Reed v. Reed, supra*, 404 U.S. at 75.¹² Accordingly, the constitutionality of denying AFDC-U to unemployed wage earners and their families while providing benefits to unemployed male wage earners and their families must be determined by applying the heightened scrutiny that this Court has invoked in prior gender classification cases. See, e.g., *Orr v. Orr*, No. 77-1119 (March 5, 1979); *Weinberger v. Wiesenfeld, supra*, *Califano v. Goldfarb, supra*, and *Craig v. Boren*, 429 U.S. 190 (1977).¹³

The heightened test which the Court has approved in recent gender classification cases is that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Orr v. Orr, supra*,

¹² "This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Weinberger v. Wiesenfeld, supra*, 420 U.S. at 639, n. 2.

¹³ Compare *Wiesenfeld* and *Goldfarb* with *Mathews v. Lucas*, 427 U.S. 495, 506 (1976) ("because illegitimacy does not carry an obvious badge, as race or sex do, this discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes.") (citations omitted); *Mathews v. DeCastro*, 415 U.S. 957 (1976); and *Califano v. Jobst*, 434 U.S. 47 (1977). The different outcomes in the gender classification cases, *Wiesenfeld* and *Goldfarb*, on the one hand, and the cases involving other bases of classification, on the other hand, demonstrates the significance of the elevated review standard applied to sex-based classifications.

slip op. at 10, quoting *Califano v. Webster*, 430 U.S. 313, 316-17 (1977) (per curiam). One distinction between the traditional test and the more rigorous test applied in gender discrimination cases is the Court's attempt to discern the actual Congressional objectives for the legislation. We turn therefore to the legislative history.

B. The Legislative History of Section 407 Demonstrates That Congress' Fundamental Objective Was to Aid Needy Families Deprived Because Of A Breadwinner's Unemployment.

The AFDC program was enacted during the Great Depression to provide financial assistance to needy children who did not have a breadwinner in the home to benefit from the work programs then being launched. H. Rep. No. 615, 74th Cong., 1st Sess. 10 (1935). The categories of needy children who were covered were therefore defined by section 406 of the Social Security Act as those "deprived of parental support or care" because of the "death, absence, or incapacity" of a parent. 49 Stat. 629 (1935). See generally *King v. Smith*, 392 U.S. 309, 327-30 (1968).

It is plain that Congress generally associated a family's deprivation of a breadwinner's support with the father's absence, death, or incapacity, and that it anticipated that the beneficiaries would therefore be "principally families with female heads." S. Rep. No. 628, 74th Cong., 1st Sess. 17 (1935); H. Rep. No. 615, *supra*, at 10. See *King v. Smith, supra*, 392 U.S. at

328-29. Adhering to a principle of sex-neutrality that continued until adoption of the gender classification at issue herein, however, Congress used the gender-neutral term "parent" in the legislation itself.

The class of children aided under the AFDC program remained limited to those with an absent, dead, or incapacitated parent until 1961, when the AFDC program was expanded to include the children of unemployed parents. Pub. L. 87-31, 75 Stat. 75 (1961). A review of the legislative history from 1961 onward shows that Congress enacted and extended the AFDC-U program for the purpose of meeting the subsistence needs of the children of unemployed workers, that Congress generally applied sex stereotypes in addressing the problem of unemployment, and that various incidental effects of the legislation, including a possible effect on the rate of desertion, were discussed from time to time but never became a purpose of the legislation.

1. THE CONGRESSIONAL OBJECTIVE OF THE AFDC-U PROGRAM WAS TO MEET THE NEEDS OF CHILDREN CAUSED BY THE UNEMPLOYMENT OF A PARENT.

The Administration offered legislation expanding the AFDC program in 1961 in order to meet the needs caused by a parent's unemployment which, "in logic and humanity," as President Kennedy said, were just as great and worthy of being met as the needs of children with an absent, dead, or incapacitated par-

ent.¹⁴ HEW Secretary Ribicoff emphasized this point in testimony before the House Ways and Means Committee:

"[T]here is no justification whatsoever for denying to the child of the unemployed parent the food that you give to the child of the parent who deserts or is absent or dead." H. Rep. Hearings on H.R. 10606, 87th Cong., 1st Sess. 102 (1961) (hereinafter 1961 House Hearings).

Both the House and Senate committee reports in 1961 explicitly described the purpose of the proposed legislation as meeting needs occasioned by a breadwinner's unemployment.¹⁵ Floor debate in both House

¹⁴ Message of President Kennedy, H.R. Rep. No. 28, 87th Cong., 1st Sess. 2 (1961) (hereinafter 1961 House Report). President Kennedy spoke in stereotypical terms, describing the sex-neutral AFDC program as one to provide aid to children deprived by the death, absence, or incapacity of a father, and describing his proposed sex-neutral AFDC-U program as one to provide for children with unemployed fathers. *Id.* Nonetheless the bill proposed by his Administration, H.R. 3865, 87th Cong. 1st Sess., defined a dependent child as one deprived because "of the unemployment of a parent." See, H. Rep. Hearings on H.R. 10606, 87th Cong., 1st Sess., 1, 5, 11 (1961). The Solicitor General incorrectly suggests that the definition adopted by Congress was broader than the Administration's recommendation to provide only for families with unemployed fathers. U.S. Brief, p. 16.

¹⁵ 1961 House Report, *supra*, at 1-3 (1961); S. Rep. No. 165, 87th Cong., 1st Sess. 1, 2-3 (1961), reprinted in [1961] U.S. Code Cong. and Ad. News 1716, 1717. For example, in the section entitled "Need for the Legislation," the House Report stated that the Committee had developed a bill "to permit States to assist children who are in need because of the unemployment of a parent" in response to the recommendation of the President that this step be taken "[a]s a part of a broader program to combat the current recession and to relieve resulting hardships. . ." 1961 House Report, *supra*, at 2.

and Senate also emphasized Congress' intent to aid families deprived because of a breadwinner's unemployment. Rep. Mills, Chairman of the Committee on Ways and Means, made this point most clearly:

"I think a child can be just as much in need because of a parent's not being able to find a job as it can because of the physical condition of a parent that prevents him from working." 107 Cong. Rec. 3761 (1961).

Somewhat later in the debates he again stressed that the legislation is "thinking here solely in terms of the welfare of this child that is needy because the parent is unemployed." 107 Cong. Rec. 3764 (1961).¹⁶ The language of the bill which passed Congress reflected this clear intent, for it allowed states to define a dependent child as one "deprived of parental support or

¹⁶ Rep. Byrnes, the second ranking minority member of Ways and Means, agreed: "What the legislation does is to add the new category which says that if the breadwinner is able to work and if he is involuntarily unemployed and no work is available, we will treat that family in the same manner we treat the family when the breadwinner is dead, absent, or incapacitated." 107 Cong. Rec. 3767 (1961). Rep. Ullman, then a junior member of Ways and Means, described the "main purpose" of the bill as "the mitigation of the needs of the unemployed." 107 Cong. Rec. 3770 (1961). Rep. Joelson stated that "pangs of hunger are no less real to the children of the unemployed who are without resources than they are to the children of the ill or absent father." 107 Cong. Rec. 3769 (1961). Rep. Doyle noted that "this bill is designed primarily and exclusively to help meet the needs of needy children where there is clearly existing involuntary unemployment on the part of the parents . . ." 107 Cong. Rec. 3763 (1961).

care by reason of the unemployment of a parent." § 407 of the Social Security Act, Pub. L. No. 87-31, 75 Stat. 75 (1961).

In 1962, Congress extended the AFDC-U program for another five years. Pub. L. 87-543, 76 Stat. 193. In renewing and increasing its commitment to families with an unemployed parent, Congress reiterated its views that a family with an unemployed parent was just as needy as the family deprived because of a parent's absence, death, or incapacity. H.R. Rep. No. 1414, 87th Cong., 2nd Sess. at 8-9, 15 (1962); S. Rep. No. 1589, 87th Cong., 2nd Sess., at 11 (1962), 108 Cong. Rec. 4268 (1962) (Rep. Mills).

Congress took action twice in 1967, the second time imposing the gender restriction at issue herein. If there were any question as to whether there was a Congressional commitment to meeting the needs of children of unemployed workers, it was answered early in the year when a further extension of the temporary authorization for section 407 was required. At that time Senator Ribicoff, recognized as the leading Senate authority on public assistance law, stressed the humanitarian purpose of the legislation:

"I told the Congress in 1962, and I say to you again, that a child can be just as hungry if a parent is unemployed as if a parent is dead, absent or incapacitated." 113 Cong. Rec. 17498 (1967).

Senator Kuchel also urged extension of this "program of the gravest importance to the welfare of my State

of California," noting that "the ultimate disaster" will be complete termination of the program "under which 100,000 children in my State alone will be adversely affected." *Id.* A one-year extension was accepted without opposition, Pub. L. 90-364, 81 Stat. 94 (1967).

The committee reports and key floor statements later in the session during discussions of legislation to make the AFDC-U program permanent therefore concentrated on the need for specific improvements in the program. In particular, Congress sought to develop a federal definition of current unemployment to assure that the needs that were being met were created by unemployment as Congress understood it, and to require that a person claiming to be unemployed had a significant prior attachment to the work-force. H.R. Rep. No. 544, 90th Cong., 1st Sess. 108 (hereinafter 1967 House Report), see *Batterton v. Francis*, 432 U.S. 416 (1977).¹⁷ The only disputes were over the breadth of the AFDC-U program, such as the debate over the Senate amendment dropped in Conference which would have made the program man-

¹⁷ The 1967 House Report characterized the AFDC-U proposal as one resulting in "improvements" (p. 107) and a more "definitive program of aid to the children of the unemployed." (p. 97). See also S. Rep. No. 744, 90th Cong., 1st Sess., 3-4, 159-160; 113 Cong. Rec. 23054 (Mills); 113 Cong. Rec. 32852 (Ribicoff). Witnesses before the House and Senate Committees continued to speak of the critical needs of families suffering from unemployment. See, e.g., House Hearings on H.R. 5710, 90th Cong., 1st Sess., 838, 1705, 1820 (1967) (hereinafter 1967 House Hearings); Senate Hearings on H.R. 12080, 90th Cong., 1st Sess., 781, 1335, 1613, 1643 (1967) (hereinafter 1967 Senate Hearings).

datory on the states. H.R. Conf. Rep. No. 1030, 90th Cong., 1st Sess. 57 (1967) (hereinafter 1967 Conference Report). There was no attempt to oppose the AFDC-U program itself as there had been in 1961, see Point I.B.2. *infra*, or to suggest that the objective of the legislation had changed.

In sum, Congress had decided that the needs of the children of the unemployed continued to be a matter of federal concern, that the AFDC-U program was a good one that only needed some greater specificity but did not need fundamental reappraisal by Congress, and that there was no longer any need to set an expiration date for the program to assure later Congressional review. Congress clearly confirmed its commitment to meeting the needs of the unemployed, retaining the 1961 statutory structure, and the definition of a dependent child as one "deprived of parental support or care by reason of . . . unemployment, . . ." Section 407(a), 42 U.S.C. § 607(a).

2. CONGRESS ENACTED THE GENDER CLASSIFICATION IN SECTION 407 ON THE BASIS OF SEXUAL STEREOTYPES ABOUT THE WAGE EARNING ROLES OF MEN AND WOMEN.

Although in 1935 and 1961 Congress frequently discussed the AFDC and AFDC-U programs by referring to the stereotypes of families deprived of a male breadwinner's support,¹⁸ it legislated in a gender

¹⁸ See e.g., *King v. Smith*, *supra*, 392 U.S. at 328; 107 Cong. Rec. 3761, 3768, and 6402 (1961); Cf. 1961 House Hearings, *supra*, at 5, 95-99, 101, 104, 326, 338, 339, 341, etc.

neutral way to provide aid to families deprived because of a parent's absence, death, incapacity, or unemployment. 49 Stat. 629 (1935); Pub. L. 87-31, 75 Stat. 75 (1961). It was only in 1967 that Congress abandoned its 32 year tradition of a gender neutral AFDC program and adopted an AFDC-U program limited to children "deprived of parental support . . . by reason of the unemployment . . . of the father." Pub. L 90-248, § 203, 81 Stat. 882 (Jan. 2, 1968). As we shall show, the legislative history demonstrates that the change from parent to father was not an "actual, considered legislative choice," *Califano v. Goldfarb*, *supra*, 430 U.S. at 223, n. 9, (Stevens, J. concurring); instead Congress simply succumbed to the traditional thinking that in two-parent families the father is the only breadwinner with significant earnings.

The adoption of the gender classification was hardly a major issue before Congress in 1967, since unlike the 1961 legislation which dealt only with the AFDC-U program, the Social Security Amendments of 1967, P.L. 90-248, 81 Stat. 821 (Jan. 2, 1968), addressed a host of issues in the OASDI, Medicare, Medicaid, and other child health and welfare programs, as well as in the AFDC program. The record of the hearings before the House Ways and Means Committee indicates a consistent pattern of stereotyping fathers as breadwinners, for witness after witness described the existing program as one for unemployed fathers rather than unemployed parents, never noting the inconsis-

tency. 1967 House Hearings, *supra*, at 838, 1705, 1820, 1836, 1927, 2056, 2366.¹⁹ The bill reported to the House floor, H.R. 12080, contained the gender classification, and the accompanying Report merely noted that "some states make families in which the father is working but the mother is unemployed eligible" but that the law would be changed so that "the program could apply only to the children of unemployed fathers." 1967 House Report, *supra*, at 108. No explanation was given as to why Congress objected to eligibility on the basis of the mother's unemployment when the father was employed, but not to eligibility when the father was unemployed and the mother was employed.²⁰ The Report did note that states vary widely in their definitions of unemployment, some going "beyond anything Congress originally envisioned." *Id.* See *Philbrook v. Glodgett*, *supra*, 421 U.S. at 707, 711 n. 6. This meant that some states were requiring very little prior attachment to the workforce, allowing non-wage earner spouses to

¹⁹ The Administration's bill which was the subject of the House Committee Hearings would have preserved the gender neutral language in § 407. See § 208(d) of H.R. 5710, set out at 1967 House Hearings *supra*, at 65.

²⁰ This Court has already noted the weaknesses of the 1967 legislative history on § 407. *Philbrook v. Glodgett*, 421 U.S. 707, 717, (1975) (legislative history ambiguous and appears to refer to the wrong subsection); *Batterton v. Francis*, 432 U.S. 416, 430, (1977) (legislative history is at variance with the Act). This is of course, the legislative history which was of so little aid to this Court in *Rosado v. Wyman*, 397 U.S. 397, 412 (1970), but of some help in *Quern v. Mandley*, 436 U.S. 725 (1978) and *Youakim v. Miller*, No. 77-742, 47 U.S.L.W. 4185 (1979).

qualify the family for benefits.²¹ The gender classification may well have been seen as one means of addressing this perceived shortcoming in the program. Thus Congress, with an image of the traditional family, might well have viewed "unemployed" mothers as homemakers and child rearers rather than involuntarily unemployed wage earners, and concluded that it did not want to aid families unless "the real breadwinner," assumed to be the father, were unemployed.²² The gender classification in § 407 passed the House without any member focusing on the change from "parent" to "father."

The Senate subsequently held hearings on H.R. 12080, the House-passed bill. Although witnesses therefore had the opportunity to address the newly adopted denial of aid to unemployed mothers, the 2000 pages of hearing testimony indicate that not one

²¹ The District Court in *Stevens v. Califano*, 448 F. Supp. 1313, 1323, n. 11 (N.D. Ohio 1978) concluded that Congress intended to provide aid when both parents were unemployed. If so, Congress certainly proceeded in a most arbitrary and ineffective manner.

²² In an uninformative exchange in 1961, Rep. Mills, floor manager of the bill, had reflected the stereotypical view of a mother's role as earner when he answered a question as to whether aid would be provided "if either the father or mother is unemployed" 107 Cong. Rec. 3765 (1961), by saying that the father usually has the responsibility for supporting the family and then by using an example of a mother earning a dollar a day. *Id.*

witness commented on the gender classification.²³ Instead the transcript is replete with interchangeable references to the unemployed parents and unemployed fathers program, to incorrect descriptions of the existing program as the unemployed *fathers* program, and to incorrect references to the unemployed *parents* provision in H.R. 12080.²⁴ Even HEW Under Secretary Cohen, whose agency's bill was gender-neutral, spoke of the H.R. 12080 "unemployed parents" program, 1967 Senate Hearings, *supra*, at 268-69. See also 717, 736. In all, the Senate Hearing Record reveals the deep-rooted nature of the perception that in two-parent families only fathers are breadwinners whose unemployment deprives the family of support.²⁵

²³ Buried in the written statements are two perfunctory objections to the gender classification by the Pennsylvania Department of Public Welfare and the United Automobile Workers. Senate Hearings on H.R. 12080, 90th Cong., 1st Sess., 1686, A254. (hereinafter 1967 Senate Hearings). In addition, there is one uninformative exchange in which Senator Long, Chairman of the Committee, seems simply to note that the change has been made, but neither he nor the witness see that as being of any significance, 1967 Senate Hearings, *supra*, at 935-37.

²⁴ See 1967 Senate Hearings *supra*, at 781, 946; 1149-51; 1295; 1305; 1335; 1523; 1538; 1613; 1634; 1917; 1941; 1995; A184; A261; A252; A286.

²⁵ During the Senate Hearings, for example, Sen. Robert Kennedy spoke of the need for the father to be the "head of the family" and of the need for jobs so that "men could go to work and their wives would not have to go on welfare." 1967 Senate Hearings, *supra*, at 788. Indeed, one witness described the effect of the mother as wage earner in a two-parent family as follows: "Males leave because they cannot stand the idea of sitting around while their wives bring in the money." *Id.* at 2021.

H.R. 12080 as reported by the Senate Finance Committee retained the gender classification in § 407, and the Committee Report adopted, verbatim, the uninformative language of the House Report on the limitation to unemployed fathers. S. Rep. No. 744, 90th Cong., 1st Sess., 160 (hereinafter 1967 Senate Report). This Report does suggest a Committee mindset which focused on the traditional family with the father as provider and the mother as homemaker, explaining that the AFDC-U prior attachment to the work test had been dropped from the House bill because "... no one needs the advantages of work and training programs more than the man who has a wife and children but has no significant history of employment." *Id.*

The gender classification in section 407 was not discussed at all during the subsequent Senate floor debates on H.R. 12080, although an auspicious opportunity arose when the Senate accepted an amendment creating a sex-neutral general assistance program for the District of Columbia entitled "Assistance to Families of Unemployed Parents." 113 Cong. Rec. 33191; P.L. 90-248, § 204(a), 81 Stat. 889, 42 U.S.C. § 644. Senator Long, floor manager of the bill, spoke interchangeably of "unemployed parents" and "unemployed fathers" when talking about AFDC-U. 113 Cong. Rec. 33193 (1967). The debates on other sections suggest that the Senators addressing the legislation simply believed that in two-parent families women stay home, and that the only matter for debate

was whether a mother in a one-parent home should be required to work.²⁶

Given these attitudes, it is not surprising that virtually no attention was given to the gender classification in section 407, the reason for the classification, or its likely effect.²⁷ The only reasonable conclusion concerning the section 407 gender classification that the legislative history supports is that Congress was legislating under the assumption that in two-parent families men are the only family providers that count, and that it simply did not occur to Congress that women in two-parent families could be wage earners whose unemployment deprived the family.

²⁶ "I believe that we should move in the opposite direction and encourage the mother to remain at home with the children." 113 Cong. Rec. 33541 (1967) (Robert Kennedy). "The mother of three or four or five children [is] needed to assure at least some parental supervision as well as doing the cleaning, the sewing, the preparations in the home that make it possible for those children to enjoy their home life. It goes without saying and we can take judicial notice of the fact, that a mother with children who has to go outside the home and work every day is not able to give those children a precious heritage we ought to try to provide for all American boys and girls, a happy home life." 113 Cong. Rec. 33612 (1967) (Morse). "Some of the best mothers in America, and the most responsible ones, hold their families together when the fathers are not available to support them—in the event of death or some unforeseen tragedy." 113 Cong. Rec. 33543 (1967) (Long).

²⁷ During the Senate Floor debate on the Conference Report Senator Muskie merely noted and opposed the gender limitation in § 407. 113 Cong. Rec. 36914 (1967).

3. CONGRESSIONAL CONCERNS ABOUT MANY POSSIBLE EFFECTS OF THE LEGISLATION, INCLUDING ITS POSSIBLE EFFECT ON DESERTION, WERE INCIDENTAL TO THE OBJECTIVE OF MEETING THE NEEDS OF THE CHILDREN OF UNEMPLOYED PARENTS.

The entire thrust of the Solicitor General's argument is that the reduction of the "incentive for unemployed fathers to desert their families" was a principal purpose of the 1961 Act, U.S. Brief, p. 13, and that the 1967 amendments changed section 407 so that its sole "function . . . was to eliminate the incentive for unemployed fathers to desert." U.S. Brief, p. 23. A review of the pertinent history shows that neither claim is correct.

As in the case of all major legislation, proponents and opponents of the legislation described a variety of effects which the legislation would have on the program at issue and on society at large, and the debates over these effects must be considered for a full appreciation of the reasons for the final bill.

The major possible effect of the 1961 Act which was debated by the bill's proponents and opponents was the increase in the federal role in public assistance. Some in Congress made it clear that they hoped that the AFDC-U program would be just one step toward a more comprehensive federal welfare program

for the poor.²⁸ Others opposed the bill because of a fundamental aversion to any expanded effort of this nature²⁹ or because they believed the states should retain responsibility for meeting the needs of two-parent families.³⁰ The AFDC-U program did become permanent, however, thereby achieving the effect which many of its original proponents had hoped for.

A second effect desired by some proponents of the bill was fiscal relief for units of state and local governments hard-pressed by the recession.³¹ Once the

²⁸ Rep. Ullman noted that the Congressionally-established Advisory Council on Public Assistance had recently urged coverage for all needy children, and that "this bill would largely carry out" that recommendation. 107 Cong. Rec. 3771 (1961). Sen. McCarthy specifically expressed the hope that this temporary measure would prompt Congress to decide to provide federal funding for state general assistance programs. 107 Cong. Rec. 6401 (1961).

²⁹ "The welfare state holds nothing but woe and degeneration for us. . . . [W]e cannot long continue this course without complete disaster." 107 Cong. Rec. 6402 (1961) (Sen. Thurmond). Rep. McFall argued that the program would impair the harvesting of crops since agricultural workers "would be supported in idleness." 107 Cong. Rec. 3758 (1961). Rep. Mason argued that such temporary emergency programs always become permanent. 107 Cong. Rec. 3764 (1961).

³⁰ Separate dissenting views of Reps. Curtis and Alger, 1961 House Report, *supra*, at 12-14.

³¹ The original bill submitted by the Administration specifically barred substitution of federal funds for state and local funds, H.R. 3865, 87th Cong., 1st Sess., see 1961 House Hearings, *supra*, at 5. This provision was deleted from the bill reported to the floor, although the Committee Report indicated that the Committee still intended that there be no substitution. 1961 House Report, *supra*, at 3. Rep. Machrowicz, a member of the Committee, made it crystal clear during floor debate that the

bill was adopted, some states moved quickly to take advantage of the federal funds offered. The impact on the state fisc was dramatic proof of the achievement of the fiscal relief effect of the bill: states that participated in the AFDC-U program experienced a decrease in their general assistance rolls, while the general assistance rolls increased in other states.³² Almost half of the persons receiving AFDC-U had been transferred from general assistance.³³ Thus the second major incidental effect of the bill was achieved.

There were also a series of effects on family life which many hoped would be achieved by passage of the bill. One speaker hoped that more children would

Committee's action meant that non-substitution was "not a legislative requirement," and that states would not be required to have "separate appropriations or separate accounting." 107 Cong. Rec. 3770 (1961). Rep. Mills agreed that "there is no way for us actually to guarantee that the money itself will go to the recipients to the full extent we wish." 107 Cong. Rec. 3765 (1961).

³² Eleven of the twelve states that entered into the AFDC-U program reduced their general assistance rolls by 171,168 recipients, or 38%, while the other states held even. The drop in some states was particularly sharp. Pennsylvania went from 106,567 recipients in December 1960 to 43,471 in December 1961, New York from 123,787 to 75,815, and Illinois, from 140,038 to 111,558. (Data on December 1960 recipient count obtained by telephone from Office of Research and Statistics, Social Security Administration, HEW, March 1979; data on December 1961 recipient count obtained from 6 Welfare in Review 46 (1968); Oklahoma data not available; the 12 states which adopted AFDC-U in 1961 are listed in the Brief for the United States, p. 30, n. 19).

³³ Hearings before Senate Finance Committee on H.R. 10606, 87th Cong., 2d Sess. 113 (1962).

be able to attend school,³⁴ for example, and another hoped that the bill would enable unemployed bread-winners to take advantage of training opportunities.³⁵ A number of speakers alluded to the unfairness of denying aid to a family with two able-bodied parents unless one parent deserted, as had the President in his statement.³⁶ These persons expressed the hope that the AFDC-U program would result in more families staying together since benefits could now be obtained even when two able bodied parents were in the home and at least one was unemployed.

Claims that the bill would actually have this anti-desertion effect provoked some skepticism, however, since many states already provided general assistance to two-parent families. HEW Secretary Ribicoff, for example, who had mentioned the possible effect of AFDC-U in promoting family stability, was forced to admit that there was little or no "desertion incentive" in more than half of the states, including all of the populous states of the Northeast, because of the existence of state general assistance programs. 1961 House Hearings, *supra*, at pp. 100, 101. This lead Rep. Curtis to characterize the desertion argument as "phony," noting that he thought it "one of these kinds of arguments that are built up to support a move that is intended for entirely different reasons."

³⁴ 107 Cong. Rec. 3761 (1961) (Perkins).

³⁵ 107 Cong. Rec. 3770 (1961) (Machrowicz).

³⁶ 107 Cong. Rec. 3765 (Baldwin), 3768 (McCormack), and 3769 (Ryan) (1961).

Id. at 262. He remained unpersuaded, see 1961 House report, *supra*, at 13, and the Report did not make any claim that the AFDC-U program would reduce desertion.

The Solicitor General places even greater reliance on Congressional intent in 1967, which he said focused entirely upon desertion. Indeed, the AFDC portion of the bill including the section on AFDC-U was considered that year against the background of mounting concern over the growth in the welfare rolls, the failure to eliminate the dependency of those on the rolls, and the problems of family dissolution (that is, desertion).³⁷ Congress attempted to address these problems directly in the legislation that emerged through provisions establishing work and training programs for recipients, providing a "work incentive" by disregarding part of recipients' earnings in determining grant amounts, strengthening the program for establishing paternity and securing the enforcement of child support obligations, and putting a "freeze" on the federal funds that would be provided for AFDC payments to children eligible because of the absence of a parent. Pub. L. 90-248, §§ 202, 204, 208, 211, 81 Stat. 881, 884, 894, and 896 (1968).

Those in Congress who were seeking to expand the coverage of the AFDC-U program against this background therefore chose to make their case by under-

³⁷ See House Report, *supra*, at 95-96; Senate Report, *supra*, at 145; 113 Cong. Rec. 10668 (Mills).

scoring the positive effects would have on family life and therefore expansion on minimizing costs over the long run. Thus, those who objected to the imposition of a prior attachment to the workforce test and to allowing states to continue to opt out of the AFDC-U program therefore invoked the specter of additional broken homes if Congress did not act. The Solicitor General, however, has misread the legislative history of these failed attempts at expansion as demonstrating that the purpose of section 407 as amended by a gender classification was to eliminate the structural incentive in the AFDC program for fathers to desert.

On the House side, the bill was reported out under a closed rule barring any amendments. One Congressman, Ryan of New York, offered an extremely lengthy statement criticizing a host of provisions in the bill, and it is to extracts from this statement that the Solicitor General particularly points this Court's attention. Yet Mr. Ryan was not speaking for the Committee on Ways and Means, of which he was not a member, nor was he describing for the House the purpose of its legislation, since he was opposing it.³⁸

The Solicitor General can find no more succor in the debates on the Senate side, where he relies exclusively on statements by Senators Harris, Kennedy, and

³⁸ It would also appear that Mr. Ryan had not been accurately advised about the nature of the bill, since he began his discussion with the statement that it was his "understanding" that the bill would make the AFDC-U program mandatory on the states, when it clearly would not. 113 Cong. Rec. 23096 (1967).

Mondale, for all of these statements were made in support of changes in, or in outright opposition to, the bill. U.S. Brief, pp. 20, 21, 23. Although one change these Senators sought, the Harris amendment making the AFDC-U program mandatory on the states, passed the Senate, even that amendment was rejected in Conference.³⁹ 1967 Conference Report, *supra*, at 57. Thereupon all three Senators joined the small block of fourteen who voted against the Conference Report. 113 Cong. Rec. 36924 (1967). There is not one statement by the sponsors of the legislation, or those supporting it, identifying the purpose of the legislation as a deterrent to desertion.

The Solicitor General's sole remaining evidence that Congress specifically saw the deterrence of paternal desertion as the purpose of section 407 is a quotation of two sentences from the 1967 Senate Report. Those sentences must be seen in the context of what preceded and followed, however (material in italics not included in Solicitor's quotation):

"The program is optional with the States and currently 22 States, including nearly 60 percent of the population of the United States, have pro-

³⁹ Senator Long, Chairman of the Finance Committee and well known for his concern over absent AFDC fathers and instrumental in the enactment of a more comprehensive child support program in AFDC, Pub. L. 93-647, Part B, § 101, 88 Stat. 2351 (1975), opposed the Harris amendment to make AFDC-U mandatory, acknowledging only that "[i]t is argued that the welfare law tends to work out, in that regard, as an incentive to break up families. . ." 113 Cong. Rec. 33193 (1967).

grams under the Federal legislation. Moreover, substantial numbers of similar families not living in those 22 States are receiving assistance under title V of the Economic Opportunity Act.

"The committee is concerned about the effect that the absence of a State program for unemployed fathers has on family stability. Where there is no such program there is an incentive for an unemployed father to desert his family in order to make them eligible for assistance. *This will be a matter of continuing study by the committee.* 1967 Senate Report, *supra*, at 160.

This is not a statement of purpose, it is at best a statement of concern and continuing interest. If the Committee had mandated the AFDC-U program on all states it could be said that it had a purpose of removing the desertion incentive, but the Committee had explicitly rejected that course of action. In any event, the Senate Report, and the House Report for that matter, never suggested that the *gender discrimination* was introduced into section 407 as a means of addressing the problem of desertion.

A better guide to the Congressional intent with respect to desertion is found by looking at those portions of the 1967 legislation addressed specifically to that issue. For example, both the House and Senate Reports, under the heading "parental desertion," described the provisions in H.R. 12080 requiring states to establish programs to enforce child support laws against absent parents. See 1967 House Report, *supra*

at 102; 1967 Senate Report, *supra* at 160. The House Report also contained under that heading a limitation for federal funding in absent parent cases. The Senate version deleted this "freeze" provision on the ground that it was unnecessarily harsh and that other provisions, including the parental support provisions, would be adequate. 1967 Senate Report, *supra*, at 1663.⁴⁰ These sections indicate that when Congress wanted to address the desertion problem, it was able to state its intent plainly and, indeed, that it chose to legislate in a gender neutral manner.⁴¹

In sum, the legislative history plainly shows that in 1961 Congress adopted the AFDC-U program to meet the needs of families deprived of a breadwinner parent's support, and that this purpose was confirmed in 1967 when Congress decided to make the AFDC-U program a permanent part of the federal govern-

⁴⁰ The freeze provision was restored by the Conference Committee. 1967 Conference Report, *supra*, at 60-61.

⁴¹ Confirmation that the Finance Committee was not addressing the problem of desertion through section 407 but through the child support program is found in a 1974 report:

"The Committee has long been aware of the impact of deserting fathers on the rapid and uncontrolled growth of families on AFDC. As early as 1950, the Congress provided for the prompt notice to law enforcement officials of the furnishing of AFDC with respect to a child that had been deserted or abandoned. In 1967, the Committee instituted what is believed would be an effective program of enforcement of child support and determination of paternity."

S. Rep. No. 1356, 93rd Cong., 2d Sess. 44 (1974). No mention is made of the AFDC-U program as a means of responding to the Committee's concern.

ment's basic program for meeting the needs of dependent children and their parents. The Solicitor General's attempt to convert the hopes of many in the Administration and Congress that the AFDC-U program would reduce the incidence of desertion into a legislative purpose to address only the problem of desertion, and then only the problem of deserting fathers, finds no support in the statutory language, the Committee Reports, or the floor statements by Committee Chairmen, and cannot even be supported by the Committee witnesses and Members of Congress upon which he relies.

C. The Gender Classification Does Not Constitutionally Serve the Objective of the AFDC-U Program, Meeting Need in Two-Parent Families Caused by Unemployment.

As shown above, the purpose for the creation of the AFDC-U program in 1961 and for its extension in 1962 and 1967 was to provide for families "deprived of *parental support*" because of unemployment. Section 407(a), 42 U.S.C. § 607(a) (emphasis supplied). By focusing the program more precisely on employable persons in 1967 Congress confirmed, not repudiated, that the purpose of the program was to meet family need caused by the unemployment of a breadwinner.⁴²

⁴² There is nearly universal agreement that meeting needs of two-parent families suffering from unemployment is at least one of the purposes of the AFDC-U program. The District Court found it the "overriding goal" of the legislation. U.S.J.S., App., p. 24A. Appellant Sharp agrees. State Brief, p. 15.

The Solicitor General, however, disagrees, U.S. Brief, p. 29, n. 19. Yet two years ago he advised this Court that the purpose of

Classifying needy families solely on the basis of the sex of the unemployed wage earner and denying AFDC-U benefits to families whose unemployed wage earner happens to be female is totally unrelated to this purpose, however, for sex is simply not an accurate basis for determining whether or not there has been a loss of *parental* support caused by unemployment. Cf. *Orr v. Orr, supra*, slip. op. at 11. Cindy Westcott's and Susan Westwood's paychecks were just as essential to their families as they would have been had they been earned by their husbands.

In failing to protect needy families against the unemployment of wage earner mothers, Congress acted on the basis of the stereotypical view of two-parent families in which only the fathers are the providers whose unemployment causes a loss of "parental support," while mothers are housewives and not also

the AFDC-U program was substantially the same as that for unemployment compensation. Memorandum for United States as Amicus Curiae, *Batterton v. Francis*, No. 75-1811, October 1976, p. 8. Certainly the Solicitor General was advising the Court then that the purpose of the two programs was to provide for income loss from unemployment and not to eliminate a structural defect in the AFDC program which results from the denial of benefits to most families in which both parents are in the home.

In any event, the Solicitor General's current claim that the 1967 Congress did not have any interest in meeting the needs of the unemployed but only in deterring paternal desertion is simply untenable, since the very method selected by Congress to achieve the Solicitor's asserted purpose was to meet subsistence needs of dependent children of unemployed fathers through the structure of a program inaugurated thirty-two years before to meet the subsistence needs of dependent children.

breadwinners. This is virtually the same "archaic and overbroad" generalization that was condemned by this Court in *Weinberger v. Wiesenfeld, supra*, namely, that "male workers' earnings are vital to the support of their families, while the earnings of female wage earners do not significantly contribute to their families' support." *Id.* at 644. Similarly, the assumption in section 407 is similar to other assumptions regarding the roles of men and women previously struck down by this Court, such as assumptions that women are dependent on their husbands, while husbands are not dependent on their wives; *Frontiero v. Richardson, supra*; *Califano v. Goldfarb, supra*; *Weinberger v. Wiesenfeld, supra*; *Orr v. Orr, supra*; that women are destined to be homemakers and childrearers, while men's place is in the market place and world of ideas, *Stanton v. Stanton*, 421 U.S. 7 (1975); and that men are more experienced in business affairs than women, *Reed v. Reed, supra*, discussed in *Frontiero v. Richardson, supra* at 683-84. See also *Taylor v. Louisiana*, 419 U.S. 522, 533-36 (1975) (rejecting as justification for exclusion of women from jury service the argument that jury service would interfere with women's distinctive role as center of home and family life); *Duren v. Missouri*, No. 77-6067, 47 U.S.L.W. 4089, 4093 (1979).

The denial of AFDC-U benefits to unemployed female wage earners and their families was adopted in 1967 because Congress acted on the basis of a stereotypical view of two-parent families. This stereotype is

offensive because it enacts into law a narrow view of the family roles of men and women that is indifferent to an individual's choice about his or her role and to changing social patterns.⁴³ By making the term "de-

⁴³ Even if it were valid in 1967, Congress' stereotype is fast becoming a relic. The labor force participation rate of married women has soared dramatically from 21.6% in April 1950, to 30.5% in March 1960, to 45% in March 1976. In 1976, 46% of mothers were in the labor force, compared to 21.6% in 1950. "Labor Force Trends: A Synthesis and Analysis and a Bibliography," Special Labor Force Report 208, U.S. Dept. of Labor, BLS (October 1977) at 6. Over 50% of married women with a husband present and children under 18 were in the labor force in March 1978. Marital and Family Characteristics of the Labor Force, March 1978, U.S. Dept. of Labor, BLS (July 24, 1978) Table 5.

Women work for the same reasons that men do—to support their families. Indeed, the women who are most likely to provide substantial support for their families, namely women in lower income families, are the ones against whom § 407 operates. Thus, wives are more likely to contribute the major portion of family income in low income families than in higher income families. In 39% of families with incomes under \$3,000, the wife contributed at least half the family's support, whereas in only 11% of families with incomes between \$15,000 and \$19,999 did the wife provide at least half the family's income. Marital and Family Characteristics of Workers, March 1977, Special Labor Force Dept. 216, U.S. Dept. of Labor, BLS, Table N.

In March 1975, over 800,000 wives with unemployed husbands and 1.8 million wives with husbands not in the labor force were working or looking for work. Many of these women were their family's only support. "Why Women Work", U.S. Dept. of Labor, Employment Standards Adm., Women's Bureau (Aug. 1978 revised) at 3. These figures simply confirm that mothers are indeed important family providers and underscore the harm worked by a legislative classification that refuses to acknowledge the importance of women's earnings to their families.

prived of *parental* support by reason of . . . unemployment" synonymous with "father," section 407 penalizes those who would depart from the role that Congress cast for them in 1967.⁴⁴

The Solicitor agrees that Congress may not justify gender classifications by invoking "archaic or overbroad" generalizations about the wage earning roles of males and females, U.S. Brief at 28, but makes no attempt to show how the gender classification fairly serves the purpose of section 407, the protection of families in need because of a parent's unemployment. The reason for this silence is clear: there is no justification under the decisions of this Court. *Weinberger v. Wiesenfeld*, *supra*; *Califano v. Goldfarb*, *supra*; *Frontiero v. Richardson*, *supra*.

D. The Gender Classification Cannot Be Sustained On the Basis That It Fairly Serves A Governmental Objective Related Solely to Deterring Paternal Deserter.

Rather than attempt to justify the gender classification in light of section 407's objective of meeting

"Of course, the result of such a policy is to give credence to the notion that women are not family providers and to make even more difficult for those women who would be. As Mr. Justice Blackmun observed in *Stanton v. Stanton*, *supra*:

"... if the female is not to be supported so long as the male, she hardly can be expected to attend school as long as he does, and bringing her education to an end earlier coincides with the role-typing society has long imposed." 421 U.S. at 15.

the needs of children, the Solicitor General argues that the 1967 decision to deny section 407 benefits to unemployed mothers should be sustained by this Court because providing such benefits solely on the basis of the unemployment of the father serves a valid governmental objective, indeed, as he would have it, the only objective for Section 407, "to eliminate the incentive for unemployed fathers to desert." U.S. Brief, p. 23.

The Solicitor is unable to show, however, that even if there were an anti-desertion objective, it was the narrow, gender-based one of deterring desertion by a father, not by either parent.⁴⁵ Moreover, even if he could show that Congress had such a narrow purpose, his argument fails because such a gender based objective for legislation is impermissible under the Fifth Amendment.

⁴⁵ To the extent Congress may have been addressing the purported desertion incentive through the AFDC-U program, its interest was to keep families together when unemployment hit, as the next section demonstrates. The Solicitor General's failure to discuss such a sex neutral anti-desertion legislative objective is implicit recognition that the gender classification cannot be sustained if the objective were to deter the desertion of either parent when a breadwinner becomes unemployed, since the classification rests on a dual sexual stereotyping of men as family breadwinners and as potential deserters when they become unemployed. Families who defy the stereotype because the mother is the unemployed wage earner are confronted with the very incentive that Congress was trying to eliminate, since the desertion of either parent, male or female, would qualify the family for AFDC. The gender classification in § 407 thus does not fairly serve the objective of keeping families together during the crisis of unemployment.

1. THE GENDER CLASSIFICATION IN SECTION 407 WAS NOT INTENDED TO SERVE A CONGRESSIONAL OBJECTIVE OF DETERRING DESERTIONS BY FATHERS.

This Court has insisted in gender classification cases upon a close review of the statute and legislative history to determine "the actual purposes underlying [the] statutory scheme," *Weinberger v. Wiesenfeld*, *supra*, 420 U.S. at 648, and to ascertain whether the classification is simply the result of "the role-typing society has long imposed," *Stanton v. Stanton*, *supra*, 421 U.S. at 15. Such an examination in the instant case demonstrates that Congress did not establish an objective in section 407, or anywhere else in the Act for that matter, of promoting family stability only when the potential desertion of the male parent was imminent.

First, as we have shown, Congress' consistent objective for the AFDC-U program has been to enable states to provide subsistence benefits to children made needy by parental unemployment. The 1961 and 1967 Committee Reports and floor statements of the bill managers do not show that § 407 generally, or the change from parent to father, was described to Congress as a measure to address desertion.⁴⁶ Any en-

⁴⁶ An important element of the Solicitor's argument, that Congress adopted the classifications relating to recent attachment to the workforce and availability for work in order to identify a "class of fathers especially subject to the pressure to desert," U.S. Brief, p. 33, is without foundation anywhere in the record.

couragement such benefits might have been thought to give to families to stay united was clearly an incidental beneficial effect of this essentially humanitarian legislation. In evaluating whether the gender classification serves the objective of the legislation, the possible effect on desertion is therefore simply irrelevant.

Second, insofar as it may be said that Congress was concerned with desertion at all in connection with the AFDC-U program, its concern was to keep families together, not whether it was the father or mother who deserted. The stated purposes of the AFDC program, including that of strengthening family life, are sex neutral, section 401 of the Social Security Act, 42 U.S.C. § 601. The supposed structural "incentive" to desertion is sex neutral as well, since section 406(a), 42 U.S.C. § 606(a), defines a dependent child as one

The classifications were adopted, of course, to identify persons who were unemployed so that benefits would only go to the children of the unemployed. Indeed, Rep. Ryan, the Solicitor's primary spokesperson for the House of Representatives on the objective of section 407 undercut the Solicitor on this point by contending that the prior workforce attachment requirement was "clearly inconsistent with the proclaimed goal of the Committee—that of strengthening family bonds" because it "would exclude those families most in need of assistance unless the father leaves the home." 113 Cong. Rec. 23096 (1967). Compare *Weinberger v. Wiesenfeld*, *supra*, 420 U.S. at 647, in which this Court found that Congress' classifications of the mothers eligible for survivors benefits was consistent only with a purpose of allowing a parent to stay home and not with the Solicitor's asserted purpose of compensating women for the disadvantages they suffer competing in the market place.

whose parent is absent. Moreover, when Congress explicitly addressed the problem of parental desertion in other portions of the bill, it did so in a consistently sex-neutral manner. Finally, to the extent that the gender classification in section 407 may be said to speak to desertion it is simply another instance in which Congress has spoken in gender based terms even though its actual objective is broader and wholly unrelated to the sex distinction, see, e.g., *Weinberger v. Wiensenfeld*, *supra*.⁴⁷

Insofar as there was any discussion of desertion by fathers in connection with section 407, it was clearly in sex stereotyped terms. The Solicitor General rests his case concerning an exclusive purpose to deter desertion by fathers almost entirely on statements made during the 1961 and 1967 hearings and floor debates. There is not an iota of evidence, however, that these speakers had a "conscious purpose" to exclude families of unemployed mothers because of a decision that such families did not need or did not deserve an in-

⁴⁷ In *Wiesenfeld*, the Court found that Congress had stated that the challenged statute was designed "'with the purpose of enabling the widow to remain at home and care for the children.'" *Weinberger v. Wiensenfeld*, *supra*, 420 U.S. at 649, quoting Final Report of the Advisory Council on Social Security 31 (1938) (emphasis supplied by the Court); see also 644 n. 13. The Court, however, identified the statutory purpose as the gender neutral one "... of enabling the surviving parent to remain at home to care for a child ..." and in light of this purpose found the gender classification "entirely irrational." *Weinberger v. Wiensenfeld*, *supra*, 420 U.S. at 651. (emphasis supplied).

centive to remain together. See *Califano v. Goldfarb, supra*, 430 U.S. at 221 (Stevens, J. concurring).⁴⁸

Rather, these debates show that the legislators simply responded to the problems of unemployment and desertion by speaking in sexually stereotypical terms of fathers as the parent who in fact most frequently left home and who traditionally were the wage earners whose unemployment created the crisis. Of course, these references are plainly part of the "baggage of sexual stereotypes," *Orr v. Orr, supra*, slip. op. at 14, in which fathers are viewed as the ones with "primary responsibility to provide a home and its essentials," *Stanton v. Stanton, supra*, 421 U.S. at 10, and the ones who will flee when they are unable to fulfill the role; mothers, on the other hand, are not breadwinners, but rather the "center of the home and family life." *Taylor v. Louisiana, supra*, 419 U.S. at 533, n. 15, quoting *Hoyt v. Florida*, 368 U.S. 57 (1961) who will surely not flee. Such stereotypical thinking cannot be the basis for the conclusion that the actual Congressional concern was preservation of family sta-

bility only when it was the father who might leave home.

Third, the Court should not find that deterring desertion by fathers was the purpose of the 1967 legislation because, as in *Orr v. Orr, supra*, slip. op. at 13, the "use of a gender classification actually produces perverse results in this case." Thus a mother's unemployment may lead to a father's decision to desert no less surely than would his own unemployment. Indeed, as the District Court noted, William Westcott was actually encouraged by his landlord to desert in order to qualify his family for benefits once Cindy Westcott became unemployed. U.S.J.S., App., at p. 27A, n.16. Since in this case it has become "clear that there is no substantial relationship between the statutes and their purported objectives," that is, the objective of deterring paternal desertion, the Court must determine "that these objectives were not the statute's goals in the first place." *Orr v. Orr, supra*, slip op. at 11, n. 10.

2. EVEN IF A CONGRESSIONAL OBJECTIVE WERE SPECIFICALLY TO DETER DESERTION BY FATHERS, SUCH A LEGISLATIVE OBJECTIVE IS IMPERMISSIBLE UNDER THE FIFTH AMENDMENT.

The other reason why the Solicitor General's argument must fail is that even if a Congressional purpose behind § 407 were to provide for unemployed fathers because they were more likely to desert than

⁴⁸ Maternal desertion was hardly unknown, however. In 1961 there were 24,300 AFDC cases in which the mother had deserted, and in 1967 there were 41,038, in each year about 3% of the caseload. In some cases there were fathers in the home, and in others the children were left in the care of another relative. "Study of Recipients of Aid to Families With Dependent Children, November-December, 1961: National Cross Tabulations," HEW, Division of Program Statistics and Analysis, Table 19 (1965); "Findings of the 1967 AFDC Study: Data By State and Census Division, HEW, National Center for Social Statistics, NCSS Report AFDC-3(67), Table 38 (1970).

unemployed mothers, such a gender-based purpose founded solely on sex stereotypes could not sustain the gender classification in § 407. As the Court held earlier this Term in striking down a sex-biased alimony statute, "the State's preference for an allocation of family responsibilities under which the wife plays a dependent role," can not justify a statute allocating benefits and burdens on the basis of gender. *Orr v. Orr, supra*, slip. op. at 10, citing *Stanton v. Stanton, supra*, 421 U.S. at 10; *Craig v. Boren*, 429 U.S. at 198.

According to the Solicitor General, Congress imposed the gender classification in the AFDC-U program because of its conclusion that women are less likely to desert than are men.⁴⁹ As with other sexual

⁴⁹ The Solicitor claims that the gender classification is not based on sex stereotypes, however, but "solid statistical evidence." U.S. Brief at 33. Thus, since HEW data on families receiving AFDC under § 406 showed that fathers deserted more frequently than mothers, Congress could constitutionally decide to give an incentive only to unemployed fathers. It is in the very nature of a stereotype, however, that there is likely to be "solid statistical evidence" to back it up. The fact that there is an empirical basis for the stereotype does not make it constitutionally acceptable; indeed, the statistics probably gave at least some credence to the stereotype underlying every sex classification which this Court has held invalid. In *Weinberger v. Wiesenfeld, supra*, 420 U.S. at 646, for example, the Court noted that "the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support." In *Califano v. Goldfarb, supra*, the Court invalidated a Social Security proof of dependency requirement imposed on widowers but not widows even though it appeared that 90% of wives were dependent while only 1% of husbands

stereotypes, the effect is to injure women by making it more difficult for them to remain at home. Congress has simply refused to recognize the economic pressure on female parents caused by their unemployment, while acknowledging the pressure on men and providing benefits under section 407. The Act therefore denies women the financial support provided men to enable them to remain with their children and spouse in the family home, enjoying the "constitutionally protected right to the 'companionship, care, custody, and management' of their own children. *Weinberger v. Wiesenfeld, supra*, 420 U.S. at 653, quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).⁵⁰

Indeed, significant numbers of mothers who do not fit the sexual stereotype have deserted families which have then qualified to receive AFDC benefits, as we have shown at note 48, *supra*. Thus the unemployment of a mother may in some cases result in the mother's desertion, as where the family is already living with the father's family, where the mother rath-

were. 430 U.S. at 220, n. 5 (Stevens, J. concurring) and 238-39, n. 7 (Rehnquist, J. dissenting). Moreover, this Court has been reluctant even to look to statistics to justify classifications since it is "dubious business . . . that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause." *Craig v. Boren, supra*, 429 U.S. at 204.

⁵⁰ Certainly no claim is made that the exclusion of maternal unemployment from § 407 is based on considerations of administrative convenience, *Califano v. Goldfarb, supra*, at 219 (Stevens, concurring), 238 (Rehnquist, dissenting), or that it was intended to compensate women wage earners for past unfair treatment. *Califano v. Webster*, 430 U.S. 313 (1977).

er than the father has better prospects in another city, or where the mother simply reaches the breaking point first.

The Solicitor General acknowledges that "family life is a basic part of our cultural heritage, and governmental action should not cause its dissolution," U.S. Brief, p. 35, citing *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). We could not agree more. Since the gender discrimination in this case is apparently designed, if the Solicitor General is right, to enable the father but not the identically situated mother to forego abandonment of the family unit, it results in the denial of benefits solely on the basis of sex and denies mothers the equal protection of the law as secured by the Fifth Amendment.

II. THE DISTRICT COURT CORRECTLY ORDERED THAT AFDC-U BENEFITS BE EXTENDED TO FAMILIES IN WHICH THE MOTHER SATISFIES ALL OF THE CONDITIONS OF SECTION 407.

The remaining issue in this case, raised only by the State of Massachusetts in No. 78-689, is whether the relief granted by the District Court was proper. In Part A of this section we show that the District Court correctly extended AFDC-U benefits to Appellees rather than invalidate the entire AFDC-U program. In Part B we show that the alternative of restructuring the program into a "principal wage earner model" is inconsistent with the structure and history of the

AFDC-U program and poses numerous questions that are beyond the competence of this Court to resolve. We therefore join the federal Appellee in seeking affirmance of the remedy ordered by the court below.

A. Extension of AFDC-U Benefits to Families of Unemployed Mothers, Not Invalidation of the Entire AFDC-U Program, is the Proper Remedy In This Case.

"Where a statute is defective because of underinclusion there exists two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion." *Welsh v. United States*, 398 U.S. 333, 361 (1970) (Harlan, J. concurring). The choice between these remedies depends upon the court's perception of "Congress' wishes" as expressed in the statute itself, "the intensity of [Congress'] commitment to the residual policy" of the statute, and "the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation." *Id.* at 365. These factors demonstrate that the remedy ordered by the District Court in this case is fully consistent with "Congress' wishes" and should be affirmed.

1. CONGRESS HAS CLEARLY STATED THAT EXTENSION IS PROPER WHERE PROVISIONS OF THE SOCIAL SECURITY ACT ARE INVALIDATED.

Section 1103 of the Social Security Act, 42 U.S.C. § 1303, provides:

If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.⁵¹

Consistent with this provision, this Court has uniformly extended benefits whenever a provision of the Social Security Act has been found unconstitutional. *Califano v. Jablon*, *supra*; *Califano v. Goldfarb*, *supra*; *Weinberger v. Wiesenfeld*, *supra*; *Jimenez v. Weinberger*, 417 U.S. 628 (1974); Cf. *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973); *New Jersey Welfare Rights Organization v. Cahill*, 411 U.S. 619 (1973); *Graham v. Richardson*, 403 U.S. 365 (1971); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

Section 1103 and this Court's prior Social Security Act decisions make clear that given a choice between

⁵¹ This provision is identical to the severability clause which Mr. Justice Harlan found "'discloses an intention to make the Act divisible, and creates a presumption that, eliminating invalid parts, the Legislature would have been satisfied with what remained,'" *Welsh v. United States*, *supra*, 398 U.S. at 364 (Harlan, J. concurring) quoting from *Champlin Rfg. Co. v. Corporation Commission*, 286 U.S. 210, 235 (1932).

denying benefits to clearly eligible persons who may desperately need them and extending coverage to a new group not included by Congress, courts should extend benefits, leaving it to Congress to make any needed adjustments. As of July 1978 there were 290,525 children and 220,102 parents in 26 states, the District of Columbia, and Guam receiving AFDC-U benefits,⁵² and undoubtedly an even larger number receiving Medicaid on the basis of meeting AFDC-U categorical requirements. Social Security Act § 1902(a)(10)(C)(i), 42 U.S.C. § 1396a(a)(10)(C)(i). Invalidation of the entire AFDC-U program would cause the most severe and irreparable injury to these families.⁵³ Extension, on the other hand, would protect these needy families in the short run, while still permitting Congress to make any needed adjustments in the future.

These considerations are even more persuasive in this case than in earlier Social Security Act cases because of the optional nature of the AFDC-U program, see *Batterson v. Francis*, *supra*, 432 U.S. at 420. While extension may require some states to cover

⁵² 42 Soc. Sec. Bull. 78 (January 1979).

⁵³ Senator Ribicoff, urging a one year extension of the AFDC program pending further action in 1967, noted that there were then 403,000 persons in 22 states receiving benefits, and continued: "If these payments stop, even temporarily, severe hardship to these individuals will result." 113 Cong. Rec. 17498 (1967). As noted in the discussion of the legislative history, Senator Kuchel said that "complete termination of the program" would be "the ultimate disaster." Id.

more families than when they adopted the program, any state that finds the additional coverage to be unacceptable may drop out of the AFDC-U program entirely. Invalidation, on the other hand, would eliminate the program in those states that desire to cover the new group along with those families already receiving AFDC-U.⁵⁴

2. EXTENSION OF BENEFITS IS CONSISTENT WITH THE HISTORY, PURPOSES, AND STRUCTURE OF THE AFDC-U PROGRAM.

The gender discrimination adopted in 1967 received no attention from Congress, as we have shown in Point I.B., and was not important to the other legislative changes made in that year. Since AFDC-U was previously enacted and extended two times as a sex-neutral program, Congress could hardly have preferred to abandon the AFDC-U program rather than allow unemployed mothers to establish eligibility.⁵⁵ In contrast, the Congressional commitment to aiding families made needy by unemployment has continued uninterrupted since 1961,⁵⁶ and has multiplied in re-

⁵⁴ Pennsylvania, for example, supports extension. Opposition to Amicus Curiae, Commonwealth of Pennsylvania, to Appellant Califano's Application for a Stay Pending Appeal, *Califano v. Westcott*, No. 78-437.

⁵⁵ The possible effect which some speakers during the floor debate felt that AFDC-U benefits could have on family stability is also served only by extension of benefits, of course.

⁵⁶ When a one year extension had to be rused through in June 1967, Senate Majority Leader Mansfield "extended the gratitude of the entire Senate" to the Senators who took the lead "for their foresight and diligent efforts to assure that these vital assistance programs will not expire."

cent years.⁵⁷ Moreover, the provision of benefits on a sex neutral basis is in harmony with the balance of the AFDC program which, since 1935, has provided benefits on the basis of the death, absence, or incapacity of *either* parent. Section 406(a), 42 U.S.C. § 606(a).

Appellant Sharp nevertheless argues that extension will "work a fundamental change in this nation's system of public assistance [by providing] a guaranteed annual income to all needy families, including the so-called working poor." State's Brief, p. 15. If this were so, it would certainly suggest a radical change in the structure of the program which would likely be far from Congress' wishes. There will be no such revolution, however. Under the District Court's order of extension, a parent seeking to qualify a family for AFDC-U benefits will still have to meet each of the requirements for AFDC-U eligibility, including the prior work attachment rule and the federal definition

⁵⁷ Total AFDC-U payments to recipients, to which the federal government contributed more than half of the cost, rose from \$163 million in 1967 to \$439 million in 1975, \$588 million in 1976, and \$606 million in 1977. (Figures obtained by combining monthly payments as reported in 5,6 Welfare in Review, Table: AFDC-UP Segment . . . [May 1967-April 1968], and HEW, SRS, NCSS Report A-2, Public Assistance Statistics [Monthly], Table: AFDC-UP Segment . . . [1975-1977].)

of unemployment.⁵⁸ Rather than making all needy families eligible, extension will permit coverage of only a small portion of needy families.⁵⁹

In addition, Appellant Sharp expresses concern that families may remain on the rolls while working⁶⁰ as the result of a provision governing the entire AFDC program, the earned income disregard in section

⁵⁸ Thus, under the District Court's order of extension, a parent seeking to qualify a family for AFDC-U benefits will still have to:

- be totally unemployed or employed less than 100 hours per month, 45 C.F.R. § 233.100(a)(1)(i);
- have earned \$50 or more in six out of 13 calendar quarters during any period ending within one year prior to application, or have received or qualified for unemployment compensation within such one year period, 42 U.S.C. § 607(b)(1)(C);
- have been unemployed for 30 days prior to the receipt of AFDC and not have refused a bona fide job offer without good cause within such 30 day period, 42 U.S.C. § 607(b)(1)(A), (B); and
- meet certain work registration requirements, 42 U.S.C. § 607(b)(2)(C).

⁵⁹ See *Batterton v. Francis*, *supra*, 432 U.S. at 427-28 ("Indeed, the other provisions of § 407 impose similar limitations, indicating that the AFDC-U program was not intended to provide assistance without regard to the reasons a person is out of work"); *Macias v. Finch*, 324 F. Supp. 1252 (N.D. Calif. 1970), *aff'd. sub. nom. Macias v. Richardson*, 400 U.S. 913 (1970) (100 hour rule sustained against challenge that many fathers working more than 100 hours were still not earning enough to meet their families' needs and should be considered unemployed).

⁶⁰ Of course, families may continue to receive AFDC-U benefits now even if the father is working 99 hours a month. 45 C.F.R. § 233.100(a)(1)(i).

402(a)(8), 42 U.S.C. § 602(a)(8) added by Congress in the 1967 amendments at issue herein. Brief, pp. 29-33. Congress recognized that the disregard would result in some working families continuing to receive benefits when it adopted the disregard in 1967,⁶¹ but obviously believed that it was more important to reward AFDC-U and other AFDC families for obtaining employment. Congress has held firm to the full earned income disregard over the years despite showings that some families may continue to receive AFDC benefits while the parent worked full-time.⁶² The fact that some families who obtain employment may still qualify for benefits of the disregard is therefore in complete harmony with the overall structure of the AFDC program.⁶³

⁶¹ See, e.g., 1967 Senate Report, *supra*, at 159.

⁶² "[S]ome states have complained that the lack of an upper limit on the earned income disregard has the effect of keeping people on welfare even after they are working full-time at wages well above the poverty line. The committee bill would deal with [this problem] by modifying the earnings disregard formula. . . ." S. Rep. No. 1431, 91st Cong., 2d Sess. 351 (1970).

⁶³ Appellant Sharp also suggests that an extended AFDC-U program is out of harmony with the Act because families in which the parents are "chronically subject to intermittent employment" may, as the result of "economic circumstance," remain eligible for AFDC-U benefits upon the unemployment of one parent and then upon the other. State's Brief, pp. 28-29. Need arising from unemployment due to economic circumstance was precisely what motivated President Kennedy to propose, Congress to adopt, the AFDC-U program in 1961.

3. THE EXTRA COSTS CAUSED BY EXTENSION DO NOT DEMONSTRATE THAT CONGRESS WOULD PREFER INVALIDATION OF THE ENTIRE AFDC-U PROGRAM.

An extraordinary increase in the costs of a federal program might suggest a Congressional preference for invalidation of that program. Here, however, no such extraordinary increase has been shown.

First, there is no evidence that the increase in cost that would be attributable to the District Court's order is so great as to raise a question as to Congressional intent. The federal government,⁶⁴ on which the largest financial burden would lie, stated below that it would be "speculative to estimate any increase in cost,"⁶⁵ and argues to this Court that extension is the appropriate remedy if the gender classification in section 407 is unconstitutional. Brief for the Federal Appellee, No. 78-689, p. 10. Moreover, as we have shown in Point I, and as Massachusetts itself recognized in the District Court, there is "no [basis for] inference . . . that Congress considered the cost of sex-neutral AFDC-U program to be prohibitive"⁶⁶ when it adopted the sex discrimination provision in 1967.

⁶⁴ As noted earlier, states that find the cost of increased coverage to be too great may drop out of the program entirely.

⁶⁵ Defendant Califano's Points and Authorities in Opposition to Plaintiffs' Motion for Partial Summary Judgment 11, August 22, 1977 (R.20).

⁶⁶ Defendant Sharp's Memorandum in Support of His Opposition to Plaintiffs' Motion for Partial Summary Judgment 17-18, Oct. 21, 1977 (R.24).

Second, the basis for the State's cost projection is highly suspect. The State reaches its estimate that 10,000 new families would become eligible, and 5,000 would begin receiving benefits the first year, by making extrapolations upon extrapolations based on little more than hunches, such as an assumption that one out of two eligible families would actually apply for AFDC-U benefits under a sex-neutral program, while only one out of four families eligible now applies for AFDC-U (A.52). In fact, the class is likely to be considerably smaller. The District Court, for example, found that the class likely consisted of 148 families and would not exceed 346 families (U.S.J.S. App. 14A, 15A, n. 8). Similarly, in an identical case in Ohio, where the AFDC-U program is twice as large as the Massachusetts program,⁶⁷ the district court found that the class "probably numbers in the tens or even hundreds."⁶⁸

Third, even the exaggerated estimates relied upon by Massachusetts are not great in comparison to the costs of the entire AFDC program, which is now running at about \$480 million a year in Massachusetts.⁶⁹ Even if Appellant's estimate of a \$7 million dollar increase in AFDC costs in the first full year of implementation is accepted, A. 50-53, the increase would

⁶⁷ 42 Soc. Sec. Bull. 78 (1979).

⁶⁸ *Stevens v. Califano*, Civ. Act. No. 77-103A, N.D. Ohio, Class Action Certification Order, November 1977, p. 6 (appeal docketed *sub nom. Califano v. Stevens*, No. 78-449).

⁶⁹ 42 Soc. Sec. Bull. 77 (1979) (monthly figure multiplied by 12).

be equal to 1-1/2 percent of total AFDC costs. Similarly, the Secretary of HEW has estimated for purposes of this case (and without any justification or explanation whatever) that total federal and state AFDC-U benefit expenditures for all participating states would increase by \$244.3 million,⁷⁰ or just over 2% of current AFDC expenditures of \$10,741 million.⁷¹ Extension in this case would therefore be far less expensive in total dollars, and little more expensive in comparative terms, than the extension in *Califano v. Goldfarb, supra*. In that case, the Solicitor General informed the Court that extension would cost \$447 million, Brief of United States, *Califano v. Goldfarb*, No. 75-699, p. 5A,⁷² or somewhat more than one half of one percent of all Social Security benefits

⁷⁰ This Court has an independent basis to question the validity of the Secretary's estimates, for the Secretary's attempts to use those estimates to determine the cost of extension in Pennsylvania were reflected by the State of Pennsylvania. That State, which provides benefits under its general assistance program similar to those which would be provided in a sex-neutral AFDC-U program, and is therefore already providing benefits to the families that would become eligible for AFDC-U, has advised this Court that Appellant Califano's cost estimates for a sex-neutral extension of Pennsylvania's AFDC-U program are exaggerated by a factor of three. Opposition of Amicus Curiae, Commonwealth of Pennsylvania, to Appellant Califano's Application for a Stay Pending Appeal, No. 78-437, Jan. 2, 1979, p. 5.

⁷¹ See Note 69.

⁷² The Solicitor argued that a holding that the gender classification was unconstitutional would "irrationally impose a further burden upon the already overstrained financing for the social security system," Brief of United States, *Califano v. Goldfarb*, No. 75-699, p. 39.

paid.⁷³ It will also have no more impact on costs than the actual increase in costs in the last three years, during which AFDC-U benefits climbed from \$326 million to \$605 million.⁷⁴

In sum, extension is the appropriate remedy in light of the Congressional commitment to the AFDC-U program as evidenced in the statute and its legislative history, and because the costs of extension is clearly not great enough to require invalidation of the entire AFDC-U program.

B. Restructuring the AFDC-U Program To Meet Appellant Sharp's View Of An Optimal Program Is Not A Remedy Available To The Court.

Appellant Sharp urges this Court to avoid the choice between extension of benefits to the excluded class and invalidation of the AFDC-U program by adopting a completely new and untested approach to AFDC-U, a "principal wage earner model" for the AFDC-U program, State's Brief, p. 8. Under this

⁷³ In 1977, cash benefits under the Social Security (OASDHI) program totalled \$84.3 billion. 42 Soc. Sec. Bull. 59 (1979). Similarly, the Solicitor advised the Court that the cost of the relief granted on statutory grounds in *Philbrook v. Glodgett, supra*, would be \$3 million in Vermont's AFDC-U program for 1975. Brief of United States, *Philbrook v. Glodgett*, No. 74-132, p. 26. Total AFDC-U expenditures for that year were less than \$4.2 million. HEW, SRS, NCSS Report A-2, *Public Assistance Statistics*, Jan.-Dec. 1975, Table 5.

⁷⁴ HEW, SRS, NCSS Report A-2, *Public Assistance Statistics*, Jan.-Dec. 1974, 1977, Table 5.

"model," benefits would be *extended* to some members of Appellee class, *denied* to other members of Appellee class (including the Westcotts, since Cindy Westcott is still unemployed but the State now considers William Westcott the principal wage earner) and denied to some current recipients.⁷⁵ Since some current recipients would lose eligibility, and some class members denied relief, an inexpensive compromise mixing both extension and invalidation would be achieved.

The Court should adopt this compromise, the State says, because surely this is what Congress would have done under the circumstances. It is not enough in this case to discern whether extension or invalidation "*more nearly accords with Congress' wishes*," *Welsh v. United States, supra*, 398 U.S. at 355 (Harlan J. concurring) (emphasis supplied); the Court must move in and re-write the Act as it believes *most nearly accords with Congress' wishes*.⁷⁶

This Court has never to Appellees' knowledge embarked upon such an adventure before.⁷⁷ Recognizing

⁷⁵ Appellant Sharp concedes that some current recipients will be terminated if the remedy he seeks is granted. State's Brief, p. 36, n. 67; p. 40, n. 83

⁷⁶ The State initially argued for extension, and only adopted its current position in favor of restructuring some time after the District Court had entered summary judgment. See, e.g., A. 44-45, 63.

⁷⁷ Appellant Sharp can cite no precedent for such action in this Court or the lower courts, and none of the cases relied upon are pertinent. *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963) upheld a statute, noting that the Court should not become involved in

the perils of attempting to fathom, many years after the fact, what Congress might have done if it had known it could not do what in fact it decided to do, the Court has chosen to stay within the channels originally carved by Congress, either by extending coverage to the excluded class, or, more rarely, by invalidating an entire statute, *Cf. Orr v. Orr, supra*, No. 77-1119, slip op. at p. 3. For these and other reasons, the restructuring approach urged by the State should not be adopted here.⁷⁸

judging the wisdom of legislative policies. *Moss v. Secretary of Health, Education, and Welfare*, 408 F. Supp. 403 (M.D. Fla. 1976), which was not a class action, held that extension of benefits to the excluded class, or of the dependency test to the automatically included class, was inappropriate. The Court did not engage in any restructuring of the program. Moreover, the holding in *Moss* was overruled by *Califano v. Goldfarb, supra*, and the parties stipulated to a dismissal of the action based on an award of benefits to the plaintiff. Civ. Act. No. 74-221, M.D. Fla., July 28, 1977. *United Low Income, Inc. v. Fisher*, 340 F. Supp. 150 (D. Me. 1972), aff'd. 470 F.2d 1074 (1st Cir. 1972), was an unsuccessful challenge to a state decision to opt out of the AFDC-U program, and therefore does not address restructuring as an alternative. The other Supreme Court cases cited in Appellant's Brief, p. 13, n. 17, involved court orders remedying school segregation, not classifications in legislation.

⁷⁸ A similar opportunity for restructuring was present in *Califano v. Goldfarb, supra*, but declined by the Court. In that case the Solicitor General advised the Court of two groups of men who would benefit from extension. The two groups were around the same size, but the first group was clearly deserving of the benefits, while the second group would be receiving a windfall. In addition, most of the cost from extension would be attributable to the benefit payments to the second group. Brief of the United States, No. 75-699, pp. 36-38. Since some wives and widows were currently receiving benefits under the windfall cate-

1. THE PRINCIPAL WAGE EARNER TEST IS NOT CONSISTENT WITH THE STRUCTURE OR HISTORY OF THE AFDC-U PROGRAM.

The most obvious objection to the principal wage earner test is that, as Massachusetts is forced to admit,⁷⁹ it would deny AFDC-U benefits to families who are currently eligible for the program. The newly excluded would be all currently eligible families in which the unemployed father is not the principal wage earner, a group which according to data presented by Massachusetts constitutes 29% of the caseload.⁸⁰

gory, restructuring would have had the further beneficial effect of eliminating these benefits as well.

Despite the savings that would have been achieved by partial extension to the first group only, there is no indication that the Solicitor General or the Court ever considered this "moderate" remedy appropriate for the Court. Instead, it was recognized that such restructuring of the Social Security program had to be left to Congress, since there were simply too many questions which were beyond the competence of the Court to address. When Congress did address this issue, it made a host of specific policy decisions and provided for a five year transition period so as not to disappoint persons nearing retirement who were expecting to receive "windfall" benefits. A special separability clause was added providing that invalidation of any aspect of the transition period would invalidate the entire transition provision but not the offset provision. Pub. L. 95-216 § 334, 91 Stat. 1544 (1977).

⁷⁹ State's Brief, p. 36, n. 67; p. 40, n. 83.

⁸⁰ The State reports that fathers are not the principal wage earner in 29% of all low-income two-parent families. A. 55. The newly ineligible families could be those in which the unemployed father who had qualified the family for aid did not satisfy the State's new principal wage earner test, and the mother could not qualify the family because she could not satisfy the federal definition of unemployment because of a lack of a prior work history or current employment.

Denying aid to these families, as proposed by Massachusetts, is inconsistent with section 1103 of the Act, 42 U.S.C. § 1303, which preserves benefits for innocent eligible recipients when a provision of the Act as applied to other persons is held invalid, and section 1104, 42 U.S.C. § 1304, under which "[T]he right to alter, amend or repeal any provision of this Act is hereby reserved to the Congress." Denying aid to such families also conflicts with section 402(a)(10), 42 U.S.C. § 602(a)(10), which guarantees benefits to all persons who fit within the federal statutory standards. See *Townsend v. Swank*, 404 U.S. 282, 286 (1971) (states may not deny aid to federally eligible persons "in the absence of Congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history.")⁸¹ Massachusetts cannot use the decree in this case as an excuse to accomplish what it is forbidden to do directly by legislation or regulation.

⁸¹ The Solicitor General supports this interpretation of § 402(a)(10) of the Act. Brief of the Federal Appellee in No. 78-689, p. 8. He also makes the obvious point that the Secretary may address any problems arising from this Court's decision by adopting regulations to the extent they are consistent with the Act, or by seeking remedial legislation to the extent changes are not permitted by law or he desires further Congressional guidance. *Id.* at 9. Whether the Secretary could use his rulemaking power to define unemployment in order to adopt a principal wage earner test without further legislation is an issue not raised by the Solicitor General or otherwise before this Court, although we would contend that such action would not be permissible under the Act and its legislative history.

Even if the principal wage earner test does not exclude otherwise eligible families, there is nothing to suggest that Congress would adopt such a test, for Congress has never relied upon the wage earner status of a parent to determine eligibility for the AFDC or AFDC-U programs. Thus, one-parent families are eligible for the basic AFDC program when either of the parents is dead or absent, and two-parent families are eligible when either of the parents is incapacitated, without respect to whether the dead, absent, or incapacitated parent was, or is, the principal wage earner, however defined. § 406(a), 42 U.S.C. § 606(a). Similarly, for purposes of the AFDC-U program, the principal wage earner status of the unemployed parent (until 1967) or unemployed father (post-1967) has never been a condition for receiving benefits.

Contrary to Appellant Sharp's contention, the legislative history of AFDC-U also provides no support for the principal wage earner test. The frequent references in the 1961 debates to protecting breadwinners, on which Appellant Sharp relies, do not show that Congress meant to preclude benefits to two-worker families. Rather, as we have already noted, Congress seems to have been largely unaware of women's role in helping to support their families and therefore simply did not consider the two-worker family.⁸²

⁸² Appellant Sharp points out that minority members of the Ways and Means Committee expressed opposition in 1961 to providing special unemployment compensation benefits to supplementary wage earners, State Brief, p. 20, n. 33. But the majority of the Committee obviously did not agree with respect to unemployment compensation, and the minority never even raised this objection with respect to AFDC-U.

More importantly, there is no evidence, and Appellant points to none, that the gender classification was introduced in 1967 in order to impose a principal wage earner test. The statement in the Committee Reports concerning the gender change, which said that the "bill would not allow" states to provide aid to "families in which the father is working and the mother is unemployed," 1967 House Report, *supra*, at 108, offers, as the District Court found, "no clear explanation." U.S. J.S., App. p. 26A. If Congress were indeed concerned with the unemployment of the principal wage earner, it surely would have expressed itself more clearly than in this cryptic statement.⁸³

Thus, the principal wage earner model results in the denial of benefits to eligible persons, is inconsistent with the basic structure of the AFDC program since 1935, and is not supported by the legislative history of section 407. There is therefore no legal basis for such a test.

2. THIS COURT SHOULD NOT MAKE THE MANY LEGISLATIVE JUDGMENTS NECESSARY TO REWRITE THE ACT AS APPELLANT SUGGESTS.

Adoption of a principal wage earner eligibility condition would also require the Court to make numerous

⁸³ It does not appear, and Appellant Sharp does not suggest, that Congress considered two wage earner families or that the terms "breadwinner" or "principal wage earner" were used anywhere in the 1967 legislative history.

legislative judgments that are not within its delegated powers under Article III. For example, as noted earlier, the principal wage earner test would result in the denial of AFDC-U benefits to persons who are now eligible. Depending upon the number of such families, Congress might elect to apply any new requirement only to new applicants, or it might allow current eligibles a grace period before withdrawing benefits. Of course, neither of these options is available to this Court.

Similarly, the definition of the term principal wage earner, which is crucial to Appellant Sharp's proposal, involves many different policy options which only Congress is competent to address. For example, should the principal wage earner be defined on the basis of a longer or shorter time period than the six months proposed by Massachusetts? (State J.S., App., p. 8a). The result may affect the eligibility of families involved in seasonal employment or in short or long term training programs. Should principal wage earner status be measured by hours, which favors the less skilled, or earnings, favoring the more skilled, as Massachusetts proposes? *Id.*, p. 7a. Should the principal wage earner be defined in the same manner as dependence is defined elsewhere in the Social Security Act, in order to promote uniformity in that Act, or to mesh with standards for eligibility for publicly funded jobs under the Comprehensive Employment and Training Act intended for the same general class of persons for whom AFDC-U funds are made

available? See, e.g., Pub. L. 95-524, § 607, 92 Stat. 2009 (1977) (eligibility for public service employment positions under Title VI of the Comprehensive Employment and Training Act based on, *inter alia*, low family income over a three month period).

In addition, many of these questions would have been resolved by Congress in 1967, and would again be resolved, in the course of determining desirable funding levels for public assistance programs and the extent to which structural reforms should be made. The Court's restructuring of the program would have to take place without the benefit of Congressional thinking on these vital issues as they relate to a principal wage earner test, however, particularly since Congress did not adopt such a test in the first place.

Finally, the restructuring approach suggested by Massachusetts requires the Court to predict how Congress would resolve additional sensitive political issues that Congress itself has not clearly considered with respect to the public assistance programs. The role of the female parent as a significant wage earner in low income households has changed dramatically since 1967, as has public awareness of the value of women's work.⁸⁴ To the extent that a principal wage

⁸⁴ Certainly federal policy as a whole has been moving away from application of principal wage earner tests as the discriminatory impact they have had upon women has been recognized. Thus the Secretary of HEW, charged broadly with the responsibility for promulgating regulations to end sex discrimination in federally funded educational programs and activities, has in-

earner test would fall most heavily on women workers, it would deny aid to persons who are now recognized as having suffered past and current discrimination in the marketplace. It would be highly inappropriate, if not impossible, for this Court to predict how Congress would react to these changed conditions when faced with the need for a gender-neutral AFDC-U program.

terpreted that mandate by forbidding "any policy . . . based upon whether an employee or applicant for employment is the . . . principal wage earner. . . ." 45 C.F.R. § 86.57, interpreting 20 U.S.C. § 1681, 86 Stat. 373 (1972).

Similarly, Equal Employment Opportunity Commission regulations prohibit employer distribution of benefits to "principal wage earner[s]" only on the ground that such a classification is a "prima facie violation of the prohibitions against sex discrimination" contained in 42 U.S.C. § 2000e-12. 29 C.F.R. § 1604.9(c). See also Wage and Hours Administrator Opinion Letter No. 1275 (WH-223), Jan. 15, 1973, CCH Labor Law Reporter Transfer Binder ¶ 30,873 ("The policy of making pay differentials based on 'head of family' or 'principal wage earner' status results in equal pay violations when the inevitable effect of the policy is to pay women less than men performing equal work.")

CONCLUSION

The judgments of the District Court appealed from in Nos. 78-437 and 78-689 should be affirmed.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 78-437

JOSEPH A. CALIFANO, Secretary of Health,
Education and Welfare,
—v.—

Appellant,

CINDY WESTCOTT, *et al.*,

Appellees.

No. 78-689

ALEXANDER SHARP, II, Commissioner of the Massachusetts
Department of Public Welfare,
—v.—

Appellant,

CINDY WESTCOTT, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

**MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*
AND BRIEF *AMICI CURIAE***

of American Civil Liberties Union, Center for Women Policy Studies, Federally Employed Women, Federation of Organizations for Professional Women, League of Women Voters of the United States, National Association of Black Women Attorneys, Inc., National Organization for Women, National Women's Health Network, NOW Legal Defense and Education Fund, Rural American Women, Women's Legal Defense Fund and Women's Lobby.

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<u>Califano v. Webster</u> , 430 U.S. 313 (1977)	48
<u>Cleveland Board of Education</u> <u>v. La Fleur</u> , 414 U.S. 632 (1974)	47
<u>Craig v. Boren</u> , 429 U.S. 190 (1977).....12,19,45,48,49,57,58	

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<u>Demiragh v. DeVos</u> , 476 F.2d 403 (2d Cir. 1973)	74
<u>Frontiero v. Richardson</u> , 411 U.S. 677 (1973)	
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<u>Graham v. Richardson</u> , 403 U.S. 365 (1971)	72
<u>Jablon v. Secretary of HEW</u> , 430 U.S. 924 (1977), aff'q 399 F. Supp. 118 (D.Md. 1975)..	22,72,76,85,107,115
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<u>New Jersey Welfare Rights Organization v. Cahill</u> , 411 U.S. 619 (1973)	72
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<u>Richardson v. Davis</u> , 409 U.S. 1069, aff'q mem., 342 F. Supp. 588 (D. Conn. 1972)	72

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<u>Silbowitz v. Secretary of HEW</u> , 397 F. Supp. 862 (D. Fla. 1975), <u>aff'd</u> <u>sub nom. Califano v. Sil- bowitz</u> , 430 U.S. 924 (1977).....	115
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107 Cong. Rec. 1795 (1961).....	35
107 Cong. Rec. 3759 (1961).....	35
107 Cong. Rec. 3761 (1961).....	60
107 Cong. Rec. 3765 (1961).....	60
107 Cong. Rec. 3766 (1961).....	35
107 Cong. Rec. 3769 (1961)...	35,60
107 Cong. Rec. 6401 (1961)...	35,60

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108 Cong. Rec. 4272 (1962)	35
108 Cong. Rec. 13879 (1962)	35
108 Cong. Rec. 14139 (1962)	35
113 Cong. Rec. 33193 (1967)	63
113 Cong. Rec. 33194 (1967)	63
33 Fed. Reg. 17111 (Nov. 16, 1968)	
34 Fed. Reg. 1146 (June 24, 1969)	119
H.R. 3864, 87th Cong., 1st Sess. (1961)	51
H.R. 3865, 87th Cong., 1st Sess. §2 (1961)	19,51,54
H.R. 10711, 95th Cong., 2d Sess. §205 (1978)	121
S.2777, 95th Cong., 2d Sess. §101 (1978)	121
H.R. Rep. No. 1414, 87th Cong., 2d Sess. (1962)	35
H.R. Rep. No. 544, 90th Cong., 1st Sess. 108 (1967) ...	53,54,77
S. Rep. No. 628, 74th Cong., 1st Sess. (1935)	50
S. Rep. No. 744, 90th Cong., 1st Sess. 160 (1960),	54
<u>reprinted in 1967 U.S. Code</u>	
Cong. and Admin. News 2834,2997	
S. Rep. No. 95-572, 95th Cong., 1st Sess. 27-28 (1978)	116
<u>President's Message on Economic</u>	
Recovery and Growth, Feb. 2, 1961,	
H.R. Doc. 81, 87th Cong., 1st Sess.	
<u>reprinted in 1961 U.S. Code Cong.</u>	
and Admin. News 1028	51,60,63

Legislative History:Page

Temporary Unemployment Compensation and Aid to Dependent Children of Unemployed Parents: Hearings on H.R. 3864 and H.R. 3865 Before The House Committee on Ways and Means, 87th Cong., 1st Sess. 103-104 (1961) .. 52,61

Books and Articles:

Bell, Working Wives and Family Income, in Economic Independence for Women 239 (Chapman, ed. 1976) 36

Collins, Social Welfare - Effect of Eligibility for Unemployment Compensation on AFDC Benefits, 78 W.Va. L. Rev. 268 (1976)..... 54

Griffiths, Sex Discrimination in Income Security Programs, 49 Notre Dame Lawyer 534 (1974)..... 41,55

Books and Articles:Page

Guberman, Sex Discrimination in Welfare Legislation, 12 Urban L. Ann 125 (1976) 55,57

Gunther, The Supreme Court 1971 Term Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972) 47

Hayghe, Families and the Rise of Working Wives -- An Overview, U.S. Department of Labor, Bureau of Labor Statistics, Monthly Labor Review 12 (May 1976) 36,37

HEW, Health Care Financing Admin., Office of Research, Medicaid Statistics April 1978 i (Nov. 1978) .. 9

Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U.L. Rev. 675 (1971) 34

"Marital and Family Characteristics of the Labor Force in March 1976," BLS Special Labor Force Report 37,113

Memorandum for the United States as Amicus Curiae, Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974) 47

x.

Books and Articles: Page

Randolph, Sex Discrimination
in the Family Benefits Section
of the Social Security Act, 8
Clearinghouse Rev. 535 (Dec.
1974) 41

41 Social Security Bulletin
(May 1978) 86, 87

42 Social Security Bulletin
(Jan. 1979) 6, 8, 9, 81, 84, 85

Task Force on Sex Discrimination
Civil Rights Division, United
States Department of Justice,
Interim Report to the President
(Oct. 3, 1978) 42, 80

U.S. Department of Labor, Bureau
of Labor Statistics, Monthly
Labor Review (April 1972) ... 37

IN THE
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MOTION FOR LEAVE TO FILE
BRIEF AMICI CURIAE

1.

The American Civil Liberties Union, the Center for Women Policy Studies, Federally Employed Women, the Federation of Organizations for Professional Women, the League of Women Voters of the United States, the National Association of Black Women Attorneys, Inc., the National Organization for Women, the National Women's Health Network, the NOW Legal Defense and Education Fund, Rural American Women, the Women's Legal Defense Fund and Women's Lobby respectfully move, pursuant to Rule 42 of this Court's Rules, to file the within brief amici curiae in Sharp v. Westcott, et al. Counsel for the appellees have consented to the filing of this brief; counsel for appellant Sharp has refused comment.

This brief is also filed on behalf of the above-listed organizations in Califano v. Westcott, with the written

2.

consent of the parties as provided in Rule 42 of this Court's Rules.

These organizations share a conviction that individuals must be free to participate in all facets of American life without discrimination on the basis of gender. Such discrimination is particularly intolerable when, as in the statute challenged in this case, its devastating impact falls upon women who are poor and their families. These organizations believe that such gender based discrimination casts the weight of the state on the side of traditional notions about male/female behavior, shores up artificial barriers to the attainment by women and men of their full human potential and retards society's progress toward equal opportunity. Because of these organiza-

3.

tions' long-standing work towards the elimination of gender discrimination, they believe their brief will be of substantial assistance to the Court in the resolution of the issues raised by these cases.

Respectfully submitted,

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Women Voters of the United States, National Associa-
tion of Black Women Attorneys, Inc., National
Women's Health Network, NOW Legal Defense and Edu-
cation Fund, Rural American Women, Women's Legal
Defense Fund and Women's Lobby.

INTEREST OF AMICI

The interest of amici appears from the foregoing motion.

QUESTIONS PRESENTED

- I. Whether Section 407 of the Social Security Act, by authorizing payment of benefits for needy children of two-parent families when the children are deprived of parental support or care because of the father's unemployment, but not for identically situated children of families deprived because of the mother's unemployment, violates the equal protection component of the due process clause of the fifth amendment.
- II. Whether the appropriate judicial remedy in this case is to extend the AFDC-U program to families in which either parent is unemployed, or to completely restructure the program through the addition of a principal wage earner test.

STATEMENT OF THE CASE

This is a class action commenced to declare unconstitutional and enjoin the enforcement of the gender classification established in Section 407 of the Social

Security Act, 42 U.S.C. §607 (hereafter Section 407), and the implementing Massachusetts welfare regulations, 6 CHSR III, Subch. A, Pt. 301, §301.03; Pt. 303 Subpt. A. §§303.01-303.04. Title IV of the Social Security Act, of which Section 407 is a part, creates the Aid to Families with Dependent Children Program (hereafter AFDC), 42 U.S.C §601 et seq. Under this program, states with an approved plan receive federal matching funds for cash assistance paid to families with a "dependent child." ^{1/}

Section 406(a) of the Act defines dependent child as a needy child deprived of parental support or care by reason of the death, absence or incapacity of a

^{1/} The amount of benefits is determined by each participating state, see Rosado v. Wyman, 397 U.S. 397(1970), and as of July, 1978, the average payment per family ranged from a low of \$817 a year in Mississippi to a high of \$4707 a year in Hawaii. See 42 Soc. Sec. Bull. 77, Table M-35 (Jan. 1979).

7.

parent. 42 U.S.C. §606(a). Section 407(a), held unconstitutional by the court below, further defines the term "dependent child" to include a "needy child ... who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father...." 42 U.S.C. §607(a). Eligibility for subsistence benefits under this Aid to Families with Dependent Children-Unemployed Fathers program (hereafter AFDC-U) depends on meeting rigorous financial and categorical criteria designed to ensure that the recipient family is needy and that the unemployed father has a recent attachment to the work force and a willingness to accept employment. 42 U.S.C. §607; 45 C.F.R. §233.100(1977).

State participation in the AFDC-U program

8.

established under Section 407 is optional.^{2/} However, states electing to participate must comply with the requirements of the Act and implementing federal regulations. See 42 U.S.C. §602. Since a dependent child is defined as one deprived because of a father's unemployment, federal matching funds may not be provided for AFDC-U benefits to children deprived because of their mother's unemployment.

Families who receive AFDC-U benefits (or, at state option, who are eligible but who have not applied for cash assistance) are also entitled to medical assistance benefits under the federal-state Medicaid pro-

2/ Twenty-six states, the District of Columbia and Guam participate in the AFDC-U program. 42 Soc. Sec. Bull. 78 (Jan. 1979).

gram. 42 U.S.C. §1396a(10).^{3/} As with AFDC-U, the Social Security Act does not permit federal matching funds to be provided for Medicaid benefits to needy children deprived of support or care because of the unemployment of their mother.

Massachusetts has exercised its option under Section 407 to make AFDC-U payments and to provide Medicaid coverage to families with children deprived of parental support or care because of the father's unemployment and receives fifty percent of the cost of its AFDC-U and Medicaid payments from the federal govern-

3/ Medicaid benefits are provided in the form of direct payments to providers of medical services. Participation in the Medicaid program is also optional with the states, but all states that participate in the AFDC-U program also participate in Medicaid. Compare 42 Soc. Sec. Bull. 78 (Jan. 1979) (states participating in the AFDC-U program) with HEW, Health Care Financing Admin., Office of Research, Medicaid Statistics April 1978 i (Nov. 1978) (states participating in the Medicaid program).

ment.^{4/} Because federal funds are not available, the state does not provide AFDC-U or Medicaid benefits to families with children deprived of support or care because of the mother's unemployment.

Appellees Cindy and John Westcott and Susan and John Westwood are married couples who reside in Massachusetts. Both are parents of a son.

On November 26, 1976, the Westcotts' application for AFDC-U benefits was denied because William Westcott did not have sufficient quarters of work to satisfy Section 407's definition of an unemployed father.

See note 7 *infra*. Cindy Westcott's potential ability to qualify her family for AFDC-U was not considered because of Section 407's gender limitation. According

4/ See 6 CHSR III, Subch. A, Pt. 301, §301.03; Pt. 303, subpt. A, §303.01, §303.04.

to an affidavit of Cindy and William Westcott, their landlord, who was seeking overdue payment of their rent, suggested that they separate so that Cindy Westcott and her then unborn child would be eligible to receive AFDC benefits. J.S. of Appellant Califano, App. 27A.

On March 2, 1977, Susan and John Westwood's application for Medicaid benefits was denied because John Westwood had insufficient work history to meet the definition of an unemployed father. J.S. of Appellant Califano, App. 10A. Susan Westwood's potential ability to qualify her family for Medicaid was not considered because of Section 407's gender limitation.

Pursuant to a stipulation for the purposes of this litigation between the attorneys for the Westcotts and the Westwoods and the attorneys for Massachusetts, the

Westcotts' and Westwoods' eligibility under Section 407 was redetermined. Based on their work histories, Cindy Westcott and Susan Westwood were found to meet the definition of "unemployed," but for the gender requirement. Pursuant to the stipulation, the Westcotts were granted AFDC-U benefits and the Westwoods were granted Medicaid benefits. J.S. of Appellant Califano, App. 9A-10A.

On April 20, 1978, the district court held that the gender classification created by Section 407 violated the equal protection component of the due process clause of the fifth amendment. It applied the review standard enunciated in Craig v. Boren, 429 U.S. 190, 197 (1977), that to withstand constitutional measurement "classifications by gender must serve important governmental objectives and must be substantially related

to the achievement of those objectives."

J.S. of Appellant Califano, App. 21A-29A.

The court first identified the governmental objectives of Section 407: the protection and care of needy children in families without a wage earner's support and the maintenance of family structure and stability. J.S. of Appellant Califano, App. 27A. It then determined that the Section 407 sex-based classification failed to further either interest. More than that, the court concluded the male/female distinction in this context was irrational and, indeed, thwarted the objective of family stability. J.S. of Appellant Califano, App. 27A. Additionally, the district court reasoned that the sex classification was impermissible because it was rooted in an archaic and overbroad generalization about the role of women in society. J.S. of

Appellant Califano, App. 29A-30A. Finally, the court ruled that the proper judicial remedy was extension of the AFDC-U program to all families with needy children in which either parent is unemployed within the meaning of the Act and implementing regulations. J.S. of Appellant Califano, App. 36A-37A.^{5/}

The federal appellant, Secretary Califano, has appealed only the holding that Section 407 violates the due process clause of the fifth amendment. The

^{5/} In accord in all respects are Stevens v. Califano, 448 F. Supp. 1313 (N.D. Ohio 1978), appeal held in abeyance, No. 78-449 (U.S. Dec. 11, 1978); Browne v. Califano, Civ. Action No. 77-1249 (E.D. Pa. June 9, 1978), appeal held in abeyance, No. 78-603 (U.S. Dec. 11, 1978). To date no jurist has reached a contrary conclusion

Massachusetts appellant, Commissioner

Sharp, although initially arguing in favor of the extension remedy, later reversed his position.⁶ He appeals only the remedy ordered by the district court.

⁶ Massachusetts, in its original argument supporting extension in the event the gender line was held unconstitutional, did not suggest that the AFDC-U program should be restructured to include a principal wage earner limitation. Appellees' Motion to Affirm 5. After the district court's April 20, 1978 order and opinion, Massachusetts moved for amendment or clarification to permit the state to redesign its AFDC-U program to incorporate a principal wage earner test. On August 9, 1978, the court denied the motion on the grounds that it was up to Congress to restructure the AFDC-U program, beyond the court's remedy. App. 43-48.

SUMMARY OF THE ARGUMENT

The court below held that Section 407 of the Social Security Act, by authorizing payments to needy two-parent families with children deprived of parental support or care because of the father's unemployment, but not to identically situated families deprived because of the mother's unemployment, violated the equal protection component of the due process clause of the fifth amendment. It ordered that the AFDC-U program, established by Section 407, be extended to all families with needy children in which either the mother or the father is unemployed within the meaning of the Act and implementing regulations. Its decision, supported in all respects by this Court's precedents, legislative history and the congressional policies underlying the AFDC-U program, warrants swift and secure affirmation.

17.

I.

This Court has made clear that laws based on archaic and overbroad generalizations about women's role in society, even when supported by empirical evidence, are inevitably biased and therefore intolerable. Califano v. Goldfarb, 430 U.S. 199 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973). The legislative history of Section 407 reveals that it is predicated upon such a generalization. Congress assumed that mothers were not wage earners and that even when they engaged in paid work, their employment would not be significant to their families. This legislative stereotyping is invidious not only because it shapes official policy but also because that policy then reinforces the accuracy of the stereotype. In spite of this, however, statistics both now and at the time

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Congress enacted Section 407 indicate that women's work is significant to many families.

Although the Solicitor General concedes that Section 407 is gender based, he then argues that it is not gender biased. His reasoning -- that in every case the family unit affected by the grant or denial of aid consists of one man, one woman and children of both sexes -- cannot withstand even cursory analysis. The classification is indistinguishable on any sensible ground from the classifications declared unconstitutional in Frontiero, Wiesenfeld and Goldfarb, in which the disfavored units were also families. Indeed, the discrimination is more pernicious here because gender operates not merely to disadvantage but totally to disqualify, and the disqualification is from a program offering only subsistence benefits.

19.

In Craig v. Boren, 429 U.S. 190 (1977), the Court made explicit the elevated review standard for sex-based classifications evolving from its precedents since Reed v. Reed, 404 U.S. 71 (1971). It made clear that "[t]o withstand constitutional challenge ... classifications by sex must serve important governmental objectives and must be substantially related to those objectives." 429 U.S. at 197. It has unequivocally reaffirmed this standard in Orr v. Orr, No. 77-1119 (U.S. Mar. 5, 1979).

The legislative history of the AFDC-U program demonstrates that its objective was to alleviate the harsh financial and social effects of parental unemployment upon the family. It was proposed by President Kennedy in 1961 along with a plan to extend the duration of unemployment compensation. Its declared purpose was to "make assistance available to needy families in which the breadwinner is unemployed." H.R. 3865, 87th

20.

Cong., 1st Sess., §2 (1961). Although the original statute was gender neutral, the congressional hearings reveal that Congress assumed that the families in need would be those who had been financially supported by the father. The 1968 amendment, changing the word "parent" to "father", sought to assure that AFDC-U would operate as intended -- as a program responsive to the unemployment of one who had in fact earned wages for the family. Congress viewed the change as a means to correct the abuse of the program by some states in which aid had been provided to full-time homemakers with no recent attachment to the labor force. In lieu of a gender-neutral method of determining eligibility, Congress sex-typed the members of the family and enacted the current Section 407.

Section 407 is not fairly related to the objective of aiding families in need due to parental unemployment. For the purposes of a child benefit program, family units faced with identical needs resulting from unemployment should receive identical benefits. Using the sex of a parent as a test for inclusion or exclusion is irrational.

Deterring father desertion, a purpose attributed to AFDC-U by the Solicitor General, was seen by Congress as an effect rather than a purpose of the program at its inception. Moreover, the 1968 gender line curtailed the original program's desertion-preventing effect. By limiting eligibility to families in which the father was unemployed, Congress once again gave fathers incentive to leave when need was caused by the mother's unemployment. It also gave unemployed mothers incentive to desert not present in the earlier

law.

II.

Because the decision to remedy a constitutionally defective statute requires a court to change a legislative provision, the courts have generally limited themselves to changes that can be accomplished in the simplest fashion possible. The choice of remedy presented has accordingly been restricted to whether the statute should be extended to bring in the individuals excluded by the legislature, or invalidated. Welsh v. United States, 398 U.S. 333, 361 (1970) (Harlan, J., concurring). When faced with this choice in gender discrimination cases, especially those involving public benefits, this Court has consistently extended the coverage of the infirm statute.

See, e.g., Califano v. Goldfarb, 430 U.S. 199; Jablon v. Secretary of HEW 430 U.S.

924 (1977), aff'd 399 F. Supp. 1118 (D. Md. 1975); Weinberger v. Wiesenfeld, 420 U.S. 636; Frontiero v. Richardson, 411 U.S. 677.

The test to determine whether extension or invalidation is the appropriate remedy for a constitutionally infirm statute is "whether it more nearly accords with Congress' wishes to eliminate its policy altogether or extend it ... to render what Congress plainly did intend, constitutional." Welsh v. United States, 398 U.S. at 355-56. In determining the remedy that Congress would prefer, the presence or absence of a severability clause in the statute, the extent of Congress' commitment to the underlying policy of the statute, the amount of disruption to the statutory scheme that might accompany extension or invalidation, and the degree

to which the remedy selected might impair legislative goals beyond those recognized by the statute itself are all relevant. An analysis of each of these factors ineluctably supports the remedy ordered by the district court in this case -- extension of the AFDC-U program to families with unemployed mothers.

Massachusetts argues that the proper remedy in this case is neither extension nor invalidation, but rather judicial restructuring of the program to include a principal wage earner limitation. Judicial redesign of this character is unprecedented. Indeed, the issue of the appropriate remedy for unconstitutionally underinclusive statutes has been limited to whether a court should extend or invalidate the statute precisely to avoid the difficult policy questions that are raised if the court is forced to sit as a legislature and evaluate all other possible remedies that might be available.

The kinds of policy decisions in which the court would have to become embroiled in order to restructure the AFDC-U program to include a principal wage earner limitation illustrate why any such restructuring should be left to Congress. First, the Court would have to arrive at a definition of principal wage earner, for there is nothing inherently obvious in Massachusetts' definition and, indeed, it is not even internally consistent. Second, the Court would have to decide whether families currently receiving AFDC-U should have their benefits terminated by judicial decree, for this would be the result in all those families in which the father is not the principal wage earner -- possibly as many as twenty-nine percent of families currently eligible. Third, the Court would have to determine whether the cost savings attributed to the principal wage earner test by

Massachusetts are sufficient to justify the imposition of such a test. This is an almost impossible task, given the way in which Massachusetts calculated those estimates. Fourth, the Court must consider whether the disparate impact that the principal wage earner test has on women should counsel against its adoption. All of these policy considerations are better resolved by Congress.

Consideration of remedies beyond extension or invalidation of the statute should be left to Congress for the further reason that it is difficult to predict the remedy that Congress would select. Moreover, if any prediction can be made, it is that Congress would favor simple extension without a principal wage earner limitation. The language and structure of the current AFDC program are inconsistent with a principal wage earner

27.

limitation. Nothing in the legislative history that Massachusetts advances supports the limitation. Further, although bills have been introduced in Congress to amend the AFDC-U program to render it gender-neutral, none of the proposals would impose a principal wage earner limitation such as that Massachusetts suggests.

Whether this Court decides to extend or invalidate Section 407, its decision is of course only a form of tentative adjudication, not a definitive response to any issues raised by the sex classification's unconstitutionality. The ultimate responsibility for the structure of the AFDC-U program rests with Congress. Should Congress decide upon restructuring more complex than extension, it is well-equipped to redesign the program expeditiously.

28.

In short, the district court's conclusion that Section 407's sex classification is based on an archaic and overbroad generalization about women and that it does not fairly advance the purpose for which it was enacted warrants this Court's firm approbation. Its extension of the AFDC-U program to families in which either parent is unemployed merits similar affirmation.

ARGUMENT

I

SECTION 407, BY AUTHORIZING PAYMENT OF BENEFITS TO NEEDY TWO-PARENT FAMILIES WITH CHILDREN DEPRIVED OF PARENTAL SUPPORT OR CARE BECAUSE OF THE FATHER'S UNEMPLOYMENT, BUT NOT TO IDENTICALLY SITUATED FAMILIES DEPRIVED BECAUSE OF THE MOTHER'S UNEMPLOYMENT, VIOLATES THE EQUAL PROTECTION COMPONENT OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

A. Section 407 Invidiously Discriminates On The Basis of Gender.

1. Section 407 creates a sex-based classification resting on archaic and stereotypical assumptions about women.

Section 407 plainly draws a distinction on the basis of gender. The challenged law distinguishes between a female wage earner in a needy two-parent family and a similarly situated male wage earner. Although the family of the former is ineligible for AFDC-U benefits, the family of the latter qualifies for these sub-

sistence payments. The legislative message is inescapable: the only wage earner who counts is male. The female wage earner, regardless of her demonstrated earning capability, ^{7/} does not even come in second; she

^{7/} In addition to the gender criteria, eligibility for AFDC-U benefits depends on meeting certain financial and categorical criteria. Each family is required to show need under a state-established standard. 45 C.F.R. §233.100(a)(1) (1977). Further, the applying parent must (1) meet the federal definition of unemployment, i.e., be employed less than 100 hours per month, 45 C.F.R. §233.100 (a) (1) (iii) (1977); 42 U.S.C. 607(a); (2) demonstrate a recent prior attachment to the work force, i.e., either have earned fifty dollars or more in each of six quarters within any thirteen-quarter period ending within one year of the application for benefits, or have received or qualified for unemployment compensation within that one year period, 42 U.S.C. §607(b) (1) (C); (3) neither have worked nor refused a bona fide job offer without good cause for 30 days prior to receipt of AFDC-U benefits, 42 U.S.C. §§607(b) (1) (A), (B); and (4) meet certain work registration requirements. 42 U.S.C. §607(b) (2) (C).

does not count at all. Nor is she seen as helping to keep the two-parent family intact. If she is out of work, it is assumed that she, unlike her husband, will remain with the family. The gender classification of Section 407, predicated upon this congressional assumption about women's role in the family, cannot pass constitutional muster.

The guiding principle emerging in the current decade from this Court's resolution of constitutional challenges to official classification by gender is evident: governmental action based on archaic and overbroad generalizations about women's role in society is inevitably biased and therefore intolerable. As stated by the Solicitor General, "no law may be based on sexual stereotypes." Brief for Appellant Califano at 26. Ineluctably, therefore, the Section 407 gender classification must fall, unless the Court casts off its previous decisions to

embrace the misconception underpinning the Solicitor General's argument. Stereotype, as he would now have it, means "unsupported belief," an assumption not backed up by "solid-statistical evidence." Id. at 33. But stereotype is not a synonym for myth or false impression. It identifies the average. Thus most of the sexual stereotypes this Court has rejected as a basis for legislative line-drawing have abundant empirical support; "solid statistical evidence" has backed them up.

For example, although it can be documented that men are generally more active than women in business affairs, the Court did not tolerate the statutory preference of men over women in the appointment of estate administrators. Reed v. Reed, 404 U.S. 71 (1971). The Court also invalidated a dependency test in the Social Security Act,

applicable to widowers but not widows, in spite of "solid statistical evidence" that 78.5 percent of all married women, and 88.5 percent of those over fifty-five, are dependent on their husbands. Califano v. Goldfarb, 430 U.S. 199, 238 n. 7 (1977) (Rehnquist, J., dissenting). See also Weinberger v. Wiesenfeld, 420 U.S. 636, 643 (1975); Frontiero v. Richardson, 411 U.S. 677, 681-682 (1973).

The insidious practice this Court has consistently condemned is the lawmakers' habit of treating men and women who do not fit the generalization -- the stereotype -- as if they did. Patterning official policy in this manner is intolerable, not because it is without empirical support, but because it relies on a stereotype accurate for some -- even many -- families and applies it to all, with the result that the stereotype continues

to be accurate.^{8/} As stated most recently by this Court, "[l]egislative classifications ... on the basis of gender carry the inherent risk or reinforcing stereotypes about the proper place of women..." Orr v. Orr, No. 77-1119 (U.S. Mar. 5, 1979), slip op. at 14. In short, the "solid-statistical evidence" argument, although advanced time and again by the Solicitor General, merits no more weight on this occasion than it has carried in the past.^{9/}

The legislative history of Section 407 reveals that the provision is predicated upon a conventional image -- a stereotype --

^{8/} See Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U.L. Rev. 675, 725-26 (1971).

^{9/} This Court has been receptive to the argument only when the classification was perceived as preferential to women. Kahn v. Shevin, 416 U.S. 351 (1974). There has never been a claim that Section 407 can be viewed as preferential to women.

identical to those condemned in this Court's prior cases. See Goldfarb, Wiesenfeld and Frontiero. Congress regarded "breadwinner" and "father" as synonyms. Mothers as "breadwinners" never entered the lawmakers' calculus. Throughout the Committee hearings and floor debates the terms "wage earner," "breadwinner" and "father" were used interchangeably.^{10/} Congress apparently assumed that genuine need would occur only when the family was deprived of the father's wages. That Congress was operating under the traditional assumption of the father's preeminent economic role in the family unit, to the virtual exclusion of the mother's, has been the firm conclusion of the district courts which, to date, have considered the issue. See

^{10/} See, e.g., 107 Cong. Rec. 1795, 3761, 3766 (1961) (remarks of Rep. Mills); 107 Cong. Rec. 3769 (1961) (remarks of Rep. Cohelan); 107 Cong. Rec. 3759 (1961) (remarks of Rep. Lane); 107 Cong. Rec. 6401 (1961) (remarks of Sen. McCarthy); 108 Cong. Rec. 14139 (1962) (remarks of Rep. Mills); 108 Cong. Rec. 4272 (1962) (remarks of Rep. Keogh); 108 Cong. Rec. 13879 (1962) (remarks of Sen. Byrd); H.R. Rep. No. 1414, 87th Cong., 2d Sess. 9 (1962).

Stevens v. Califano, 448 F. Supp. 1313; Browne v. Califano, No. 77-1249.

In spite of legislation such as Section 407 reflecting and reinforcing traditional notions, the trend in today's labor market runs in the opposite direction. Women's work does count in many families. Today, the dual wage earner family represents "the typical American pattern."^{11/} In 1975, wives contributed approximately twenty-six percent of their families' income and of

^{11/} Bell, Working Wives and Family Income, in Economic Independence for Women 239, 254, 258 (Chapman, ed. 1976). In 1975, nearly half of all husband-wife families had two workers or more and about two-fifths of all children under eighteen were in such families. Hayghe, Families and the Rise of Working Wives -- An Overview, U.S. Department of Labor, Bureau of Labor Statistics, Monthly Labor Review 12 (May 1976)

these, approximately twelve percent contributed fifty percent or more.^{12/}

Moreover, statistics contemporaneous with the enactment and amendment to Section 407 demonstrate that women's employment at that time was significant to their families. From 1960 to 1970, the median proportion of family income contributed by gainfully employed wives approximated twenty-seven percent.^{13/} This contribution rose to thirty-nine percent for wives who worked full time.^{14/}

12/ See Marital and Family Characteristics of the Labor Force in March 1976, BLS Special Labor Force Report 206, Table L, at A-41. In March 1975, 72 percent of gainfully employed wives were working full time. About 27 percent of mothers with preschool age children worked full time in 1974. This figure rises to 41 percent of mothers of school age children. Hayghe, Families and the Rise of Working Wives - An Overview, supra, at 16 n. 11.

13/ U.S. Department of Labor, Bureau of Labor Statistics, Monthly Labor Review 8 (April 1972).

14/ Id.

Had the old notion that men are wage earners and women their dependents been less deeply ingrained, the 90th Congress might have noticed that women's employment is often crucial to their families' well being and thus that women's unemployment, too, can have a devastating impact. Instead, Section 407 reflects the habitual legislative disregard of women workers, their status, and the reality of family economic interdependence. The classification diminishes the value of women's contributions to family income, aggrandizes the value of men's contributions and places an official imprimatur on categorization of women as second-class workers.

2. Section 407 discriminates against women and their families by depriving them of benefits granted to identically situated men and their families.

Although the Solicitor General concedes that Section 407 "unquestionably entails a

distinction on the basis of gender."

Brief for Appellant Califano at 7, he then argues that its application is not "gender biased." Id. at 8. His reasoning -- that "in every case the grant or denial of aid to the entire family affects, to an equal degree, one man, one woman, and children of both sexes" -- cannot withstand even cursory analysis. Id. The classification is indistinguishable on any sensible ground from the classifications declared unconstitutional in Frontiero,

Wiesenfeld and Goldfarb. Those decisions ineluctably establish that Section 407 invidiously discriminates against both the woman and her family.

In Frontiero, the Court invalidated a dependency test for male but not female military spouses. Only the servicewoman was required to prove her spouse's dependency in order to receive a housing allowance for the

couple and medical and dental benefits for the spouse. No such requirement was imposed upon servicemen. Since the benefits in question were designed only for family units, every benefited unit, and correspondingly, every disfavored unit, consisted of a man and a woman. Nonetheless, the Court ruled that the denial of a housing allowance and medical and dental benefits to Sharron and Joseph Frontiero was indeed gender based and gender biased.

In Weinberger v. Wiesenfeld, and Califano v. Goldfarb, in which the Court held gender-based distinctions in the Social Security Act invalid, the disparity in family benefit eligibility when the covered wage earner was female was also at

issue.^{15/} For example, in Wiesenfeld, the Court found the "gender-based distinction... entirely irrational. The classification discriminates among surviving children solely on the basis of the sex of the surviving parent." 420 U.S. at 651. In Goldfarb, requiring widowers but not widows to prove dependency on a covered wage earner was held impermissible because "Social Security is designed ... for the protection of the family and the section discriminates against one particular category of family -- that in which the female spouse is a wage earner covered by social security." 430 U.S. at 209.

^{15/} In addition to the Court's multiple findings of unconstitutional gender discrimination in the Social Security Act, commentators have repeatedly criticized the discriminatory, stereotypical assumptions upon which many of the Act's benefit programs are predicated. See, e.g., Randolph, Sex Discrimination in the Family Benefits Section of the Social Security Act, 8 Clearinghouse Rev. 535 (Dec. 1974); Griffiths, Sex Discrimination in Income Security Programs, 49 Notre Dame Lawyer 534, 543 (1974).

The statute in this case is as gender based in origin and as gender biased in result as the statutory provisions invalidated in Frontiero, Wiesenfeld and Goldfarb. Indeed, in stunning contrast to the Solicitor General's outlandish "no gender bias" argument, the Department of Justice's own Task Force on Sex Discrimination has described Section 407 as "overtly and substantively discriminating against women."^{16/} Moreover, the discrimination here is, if anything, even more blatant and more harmful than that in Frontiero, Wiesenfeld, or Goldfarb. First, Frontiero and Goldfarb involved presumptions that could be rebutted. In those cases, spouses of female wage earners who could prove dependency, albeit under a stringent

^{16/} Task Force on Sex Discrimination, Civil Rights Division, U.S. Department of Justice, Interim Report to the President 156 (Oct. 3, 1978).

income proportion test, could qualify for benefits. Here, gender operates not merely to disadvantage but totally to disqualify. Under no circumstances could Cindy Westcott or Susan Westwood establish eligibility for their respective families, because it was they, rather than their husbands, who met the employment-related criteria of Section 407.

Second, as the court below observed, the discrimination and deprivation of monetary benefits is more harmful to the families here than in Wiesenfeld or Goldfarb because "[t]he Social Security benefits denied in Wiesenfeld and Goldfarb were not subsistence or medical care payments designed to meet the basic needs of the plaintiffs as are the benefits denied the plaintiffs in the instant case." J.S. of Appellant Califano, App. 33A. cf. Mathews v. Eldridge, 424 U.S. 319(1976).

In sum, Section 407 creates a classification that is both gender based and gender biased. This has been the conclusion of the lower courts, the Department of Justice Task Force on Sex Discrimination and, apparently, even the Attorney General of Massachusetts, who has not appealed the district court's holding on this issue. The Court's precedents in Frontiero, Wiesenfeld and Goldfarb lead unavoidably to a determination that the instant classification invidiously discriminates on the basis of gender.^{17/}

^{17/} The Solicitor General's attempt to distinguish Frontiero, Wiesenfeld and Goldfarb from the instant case because the former involved benefits distributed as compensation for work or in relation to the contributions of covered employees simply ignores the Court's precedents. Brief for Appellant Califano at 25-26. Although it is true that Congress has wide latitude to create classifications that allocate non-contractual benefits under a social welfare program, Weinberger v. Salfi, 422 U.S. 749, 776-777 (1975), these must fall within constitutional (Footnote continued on next page)

B. The Section 407 Gender-Based Classification Is Not Substantially Related to any Important Governmental Objective.

1. The proper standard of review for the Section 407 gender-based classification is set forth in Craig v. Boren.

In Craig v. Boren, 429 U.S. 190 (1977), this Court set forth the standard for testing the constitutional validity of gender-based classifications. The Court announced: "To withstand constitutional challenge,

limits. Califano v. Goldfarb, 430 U.S. at 210-211.

It is now plain that in cases involving social welfare legislation generally, male/female classifications are impermissible, although classifications drawn on other bases can withstand constitutional review. Compare Weinberger v. Wiesenfeld, 420 U.S. 636, and Califano v. Goldfarb, 430 U.S. 199, with Mathews v. Lucas 427 U.S. 495 (1976), Mathews v. DeCastro, 429 U.S. 181 (1976) and Califano v. Jobst, 434 U.S. 47 (1977). Surely the explicit male/female classification in the social welfare legislation at issue in this case ranks with Wiesenfeld and Goldfarb, not with Lucas, DeCastro and Jobst.

previous cases establish that classifications by sex must serve important governmental objectives and must be substantially related to those objectives." Id. at 197. Although the Solicitor General has raised a question of the Court's consistent adherence to this heightened scrutiny standard, see Brief for Appellant Califano at 24-27, thoughtful analysis of the Court's gender-based discrimination decisions since

Reed v. Reed, 404 U.S. 71 (1971), leaves no doubt that the standard is firmly established. Indeed, the Solicitor General's invitation to the Court to retreat to a lesser standard is inexplicable in light of the position tendered by his predecessor, that it "is now settled that the Equal Protection Clause of the Fourteenth Amendment (like the Due Process Clause of the

Fifth) does not tolerate discrimination on the basis of sex." Memorandum for the United States as Amicus Curiae at 8, Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974).

From the start, the Court plainly indicated that the objective of a gender-based classification had to be more than merely "legitimate." In Reed v. Reed, 404 U.S. 71, the Court held that the "legitimate" objectives of reducing the workload of probate courts and avoiding familial controversy --both recognized as "legitimate" -- were not sufficiently important to justify resort to a sex-based criterion in the appointment of estate administrators.^{18/} Similarly, in Frontiero

^{18/} Professor Gunther discerned from the Court's opinion in Reed that "some special sensitivity to sex as a classifying factor [had] entered into the analysis." Gunther, The Supreme Court 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 34 (1972).

v. Richardson, 411 U.S. 677, the Court held administrative convenience insufficiently important to justify automatic labeling of the wife, but not the husband, of a service member as "dependent."

Explicit statement in Craig v. Boren, of an elevated review standard for gender-based classifications simply confirmed the Court's evolving precedents. See also Stanton v. Stanton, 421 U.S. 7, 17 (1975). Since Craig, the Court has utilized the standard without reservation. In Califano v. Goldfarb, 430 U.S. at 210-211, Justice Brennan, speaking for a plurality, reiterated the Craig formulation. The per curiam opinion in Califano v. Webster, 430 U.S. 313, 316-17 (1977), expressly applies the test. And most recently, Justice Brennan, speaking for six members of the Court,

confirmed the elevated review standard of Craig for sex-based classifications.

Orr v. Orr, No. 77-1119 (U.S. Mar. 5, 1979).

In sum, sex-based classifications have been given heightened scrutiny since Reed

v. Reed. The reason for close review was well-stated by the court in Mathews v. Lucas, 427 U.S. 495, 506 (1976): sex, like race, is an "obvious badge" contributing to "the historic legal and political discrimination against women" that has been severe and pervasive. Absent the check of close review, the risk is high that legislation distinguishing between men and women based on "habit, rather than analysis or actual reflection" will arbitrarily restrict the options and activities of individuals. Id. at 520. See Craig v. Boren, 429 U.S. at 213 n.5; Califano v. Goldfarb, 430 U.S.

at 222 (Stevens, J., concurring in both).

2. Section 407 does not fairly advance the objective it was enacted to serve.

(a) Legislative history demonstrates that the governmental objective of Section 407 was to alleviate the harsh financial and social effects of parental unemployment upon needy families.

The paramount concern of the AFDC program, originally proposed by President Roosevelt to counter the effects of the Depression, is the welfare of the child.^{19/} The child entitled to aid was defined as one who was needy and deprived of parental support or care by reason of the death, absence or incapacity of a parent.^{20/}

^{19/} S. Rep. No. 628, 74th Cong., 1st Sess. 16-17 (1935), quoting Message of the President Recommending Legislation on Economic Security, House Doc. No. 81, 74th Cong., 1st Sess. 17 (1935).

^{20/} Children from two-parent households, disadvantaged only by parental unemployment, were presumed by the legislators to be benefited through "the work relief program and still more through the revival of private industry." S. Rep. 628, 74th Cong., 1st Sess. 18 (1935).

In 1961, in response to the nation's economic recession and the concomitant impact of increased unemployment, President Kennedy proposed two programs. The first extended the duration of unemployment compensation to postpone the devastating impact on the family when those benefits ran out.^{21/}

The second authorized the Aid to Families with Dependent Children - Unemployed Parent (AFDC-U) program and was heralded as "an interim amendment to the aid to dependent children program to include the children of the needy unemployed."^{22/} The declared purpose of the AFDC-U program was "to make assistance...

available to needy families in which the breadwinner is unemployed."^{23/}

21/H.R. 3864, 87th Cong., 1st Sess. (1961).

22/ President's Message on Economic Recovery and Growth, Feb. 2, 1961, H.R. Doc. 81, 87th Cong., 1st Sess., reprinted in 1961 U.S. Code Cong. and Admin. News 1028, 1033.

23/ H.R. 3865, 87th Cong., 1st Sess. §2 (1961).

While the animating purpose of the AFDC-U program is clear, hearings on the 1961 bill and on the 1962 bill to extend the program for five years display the stereotypical notions Congress entertained about the family an unemployed parent provision would aid. Representative Wilbur Mills, the sponsor of the 1961 bill, repeatedly referred to the "needy child...whose father is unemployed."^{24/} The terms "wage earner," "breadwinner" and "father" were used interchangeably throughout hearings in 1961 and again in 1962.^{25/} In spite of the use of these terms, however, the original AFDC-U program and the five-year extension were gender neutral.

24/ Temporary Unemployment Compensation and Aid to Dependent Children of Unemployed Parents: Hearings on H.R. 3864 and H.R. 3865 Before the House Committee on Ways and Means, 87th Cong., 1st Sess. 103-104 (1961) (emphasis added).

25/ See note 10 supra.

The 1968 amendments to AFDC-U gave the Department of Health, Education and Welfare the authority to define unemployment, required a prior attachment to the labor force, made the program permanent and expressly conditioned benefits on the unemployment of the father instead of a parent.^{26/}

These amendments were designed to correct the flaw in the prior law under which the states had the authority to define unemployment. The result had been that "[in] some instances the definitions [were] very narrow so that only a few people were helped. In other states, the definitions [went] beyond anything that Congress originally envisioned."^{27/} The 1968 amendments were designed to provide a uniform definition of unemployment.

^{26/} 42 U.S.C. §607.

^{27/} H.R. Rep. No. 544, 90th Cong., 1st Sess. 108 (1967).

ment.

As part of this effort, Congress redefined the needy child as one deprived of parental support by reason of the unemployment of the father. The change was described by the House and Senate Reports as follows:

"This program was originally conceived as one to provide aid for children of unemployed fathers. However, some States make families in which the father is working but the mother unemployed eligible. This bill would not allow such situations."^{28/}

By changing the term parent to father, Congress sought to assure that AFDC-U would operate as intended from the start -- as a program responsive to the deprivation caused by unemployment of a family wage earner.^{29/}

^{28/} H. Rep. No. 544, 90th Cong., 1st Sess. 108 (1967); S. Rep. No. 744, 90th Cong., 1st Sess. 160 (1967), reprinted in 1967 U.S. Code Cong. and Admin. News 2834, 2997.

^{29/} See H.R. 3865, 87th Cong., 1st Sess. §2 (1961). See also Collins, Social Welfare - Effect of Eligibility for Unemployment [Footnote continued on next page.]

It viewed the change as a means to correct the abuse of the program by some states in which aid had been provided to full-time homemakers with no recent attachment to the labor force. As the court observed in

Stevens v. Califano:

The problem with the program ... was that the language chosen in the original enactment only required one parent to be unemployed. Inasmuch as the AFDC-U program added two parent families, said language permitted needy families in which the "breadwinner" was fully employed to receive benefits based upon the unemployment of the "non-breadwinner." This problem was aggravated by the fact that before 1968, no prior connection to the work force was requisite to receipt of benefits. The purpose of the amendment to Section 407, therefore, was to eliminate benefits to families in which the breadwinner was fully employed. 448 F. Supp. at 1321.

Compensation on AFDC-U Benefits, 78 W.Va.L. Rev. 268, 268-269 n. 6 (1976); Guberman, Sex Discrimination in Welfare Legislation, 12 Urban L. Ann. 125, 147 (1976). See also Griffiths, Sex Discrimination in Income Security Programs, 49 Notre Dame Lawyer 534 (1974).

In lieu of designing a gender-neutral method of determining eligibility, however, Congress sex-typed the characters in the family, denominating fathers as financial providers whose unemployment would hurt the family and mothers as perennial homemakers whose unemployment was irrelevant. By drawing this sex line, Congress demonstrated the very brand of narrow, sex-role thinking this Court has consistently rejected as invidiously assigning second-class status to women.

(b) Section 407's gender classification does not fairly advance the legislative objective of protecting families rendered needy by the unemployment of a parent.

Despite the Westcott family's dire need and despite Cindy Westcott's ability to satisfy the employment-related criteria of Section 407, her family was ineligible for AFDC-U benefits. The sole reason was that, under the statute, Cindy belonged to the wrong sex.

This gender-based exclusion is not fairly related to the objective of aiding children in families rendered needy by parental unemployment. For the purposes of a child-benefit program, family units faced with identical needs resulting from unemployment should receive identical benefits. Using the sex of a parent as a test for inclusion or exclusion is entirely irrational; ^{30/} it fails as a "legitimate, accurate proxy" for determining these needs. Craig v. Boren, 429 U.S. at 204.

As the district court in this case pointed out:

[I]n denying assistance when the female working parent becomes unemployed, many families with needy children, the targets of the AFDC program, go unaided.... Section 407 creates two groups

^{30/} See also Guberman, Sex Discrimination in Welfare Legislation, 12 Urban L. Ann. 125,150 (1976).

of two parent families with needy children who are without support because the wage earner is unemployed: one group where the wage earner is male, and the second where the wage earner is female. The first group may receive AFDC-U and Medicaid, but the second may not. J.S. of Appellant Califano, App. 27A.

In terms of familial need because of parental unemployment, the two are identical. In terms of furthering the goal of alleviating this type of familial need, the gender-based distinction is not rational. In short, the state does not govern impartially when benefits are allocated unevenly and arbitrarily solely along sex lines. See Craig v. Boren, 429 U.S. at 211 (Stevens J., concurring).

3. Prevention of paternal desertion was not the objective of the Section 407 gender classification. In any event, the sex classification does not fairly serve the need of deterring paternal desertion.

Although ameliorating the devastating economic effects of parental unemployment upon the family was the legislative objective Congress pursued in the AFDC-U legislation, the Solicitor General posits another purpose for the program generally and the gender classification in particular: preventing father desertion. However, at the inception of the program, deterring father desertion was seen by Congress as an effect rather than a purpose. Moreover, the gender line later drawn substantially detracts from the program's desertion-preventing effect.

President Kennedy, in his 1961 message to Congress, emphasized that "under the aid to dependent children program, children are eligible for assistance if their fathers are deceased, disabled or family deserters. In logic and humanity, a child should also be eligible if his father is a needy unemployed

worker."^{31/} Although President Kennedy spoke of father desertion as an undesirable effect of the AFDC program,^{32/} he saw the alleviation of family hardship occasioned by unemployment as the core purpose of the AFDC-U program, as did then-Secretary of Health, Education and Welfare Ribicoff. Thus, in 1961 testimony Secretary Ribicoff explained the purpose of twin administration bills introduced that year -- one the AFDC-U proposal and the other an extension of the duration of unemployment compensation. That purpose was to "provide

^{31/} President's Message on Economic Recovery and Growth, Feb. 2, 1961, H.R. Doc. 81, 87 Cong. 1 Sess. 2 (1961). Ironically, although both the AFDC program and the proposed AFDC-U program were gender neutral, President Kennedy's message reflected the pervasive habit of thought that fathers are wage earners and mothers are homemakers by its use of the word "father" as the only parent whose inability to provide would adversely affect the family.

^{32/} A number of legislators expressed similar views. See, e.g., 107 Cong. Rec. 3769 (1961) (remarks of Representative Ryan); 107 Cong. Rec. 3765 (1961) (remarks of Representative Baldwin); 107 Cong. Rec. 6401 (1961) (remarks of Senator McCarthy).

a temporary program ... under which States could provide financial assistance to families in need because of unemployment." ^{33/}
 The design, as the Secretary put it, was "to help the States provide income maintenance to needy families of the unemployed as part of the administration's program to stimulate the national economy and relieve unemployment and hardships resulting therefrom." ^{34/}

The Administration's view that one of the effects of the original AFDC-U program would be to deter paternal desertion may well have been accurate, for when either parent's unemployment can qualify the family for aid, neither has an incentive to leave home to enable the family to qualify for AFDC based on his or her absence. But by

drawing the 1968 gender line, Congress drastically curtailed any incentive to remain with the family it had earlier fostered. ^{35/}
 By limiting eligibility to families in which the father was unemployed, Congress once again gave fathers the incentive to desert every home in which need was caused by the

^{35/} The statistics on desertion cited by the Solicitor General do not aid his case. He asserts they show that the rate of father desertion in AFDC families decreased in those states which adopted the AFDC-U program. However, all of the data are from the period 1961-1967, when the AFDC-U program was gender neutral. While the 1961-1967 gender-neutral statute may have had a beneficial effect on the problem of father desertion, that is not germane to the Solicitor's argument. Beyond question, 1961-1967 statistics fail to demonstrate that the gender line first introduced in the 1968 law in any way furthers the hypothesized legislative objective.

^{33/} Hearings on H.R. 3864 and 3865 Before House Comm. on Ways and Means, 87th Cong., 1st Sess. 94 (1961).

^{34/} Id.

mother's unemployment.^{36/} It also gave unemployed mothers an incentive to desert not present in the earlier law. In short, Congress' only concern for even-handedness was between fathers who, but for monetary incentive, would desert their families and those who out of "conscience and love," would remain.^{37/}

^{36/} The weakness in the Solicitor General's argument attributing to the gender line a purpose to deter desertion is further indicated in the legislative history surrounding the 1968 amendment. For example, in the Senate debate on whether the AFDC-U program should be mandatory rather than permissive for all states, although Senators Harris and Kennedy acknowledged the program's desirable side effect of preventing paternal desertion, no mention was made of accomplishing such an effect by drawing the gender line. See 113 Cong. Rec. 33193 (1967) (remarks of Senator Harris); 113 Cong. Rec. 33194 (1967) (remarks of Senator Kennedy). See also Stevens v. Califano, 448 F. Supp. at 1322.

^{37/} See President's Message on Economic Recovery and Growth, supra note 31.

The Westcotts' situation exemplifies the way in which the alteration in the AFDC-U formula, replacing "parent" with "father", actually increased any incentive to desert. But for her sex, Cindy Westcott could have qualified her family for AFDC-U benefits. Her husband, William, because of insufficient work history, could not. The only route to AFDC eligibility for the Westcotts was one parent's abandonment of the home. This incentive to desert, inherent in the gender-based distinction, did not pass unnoticed by the Westcotts -- or their landlord. In fact, the landlord suggested that William Westcott leave home so his family could qualify. See J.S. of Appellant Califano, App. 27A, n. 16.

In sum, the Solicitor General's attempt to elevate the acknowledged effect of the original Section 407 into the purpose of

the 1968 gender line must fail. It is not supported by the legislative history nor by the statistics he cites. Indeed, common sense analysis demonstrates unequivocally that the gender line reinserted into the AFDC-U program incentives to desert eliminated under the original program.^{38/}

^{38/} The Solicitor General has suggested no other governmental objectives to be served by the gender classification of Section 407. The Solicitor General has abandoned the argument, suggested for the first and only time in his Jurisdictional Statement, that Congress instituted the gender line in Section 407 to save money. J.S. of Appellant Califano, App. 7, n. 6. Furthermore, this Court's precedents make clear that fiscal policy considerations cannot justify otherwise invidious discrimination. See e.g., Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973); Califano v. Goldfarb, 430 U.S. at 204-205, 217. Nor can "administrative convenience" serve as a cover for legislative resort to sex-stereotyping. Reed v. Reed, 404 U.S. 71; Frontiero v. Richardson, 411 U.S. 678. Exclusion of families with unemployed mothers from the AFDC-U program does not qualify as a reasonable, economy-minded substitute for a sex-neutral, functional classification.

C. Conclusion

Congress was confronted with the problem of providing for the many families rendered needy by unemployment during the economic recession of the early 1960's. Instead of designing a sex-neutral, functional classification for determining eligibility for its new program, Congress applied the archaic and over-broad generalization that women do not significantly contribute to their families' financial support and, therefore, that their unemployment will not have a significant impact on their families' well being. The sex classification does not fairly address the problem Congress faced. Based on this Court's secure line of decisions from Reed through Goldfarb, the district court concluded that invalidation of the gender line was the only resolution consistent with the fifth amend-

ment's command that government rule impartially. See also Orr v. Orr, No. 77-1119 (U.S. Mar. 5, 1979). That conclusion warrants this Court's firm approbation.

II

THE APPROPRIATE JUDICIAL REMEDY IN THIS CASE IS TO EXTEND THE AFDC-U PROGRAM TO FAMILIES IN WHICH EITHER PARENT IS UNEMPLOYED, NOT TO COMPLETELY RESTRUCTURE THE PROGRAM THROUGH THE ADDITION OF A PRINCIPAL WAGE EARNER TEST.

A. Introduction

The district court decided that repair rather than invalidation of the AFDC-U program was the appropriate remedy for the constitutional defect of Section 407.

The proper repair, the court held, was simply to extend AFDC-U benefits to needy families with unemployed mothers under the same conditions that now apply to unemployed fathers. In short, if either parent satisfies the employment-related criteria of Section 407, and the family is needy, eligibility for both AFDC-U and categorically-related Medicaid benefits is

established. See note 7 supra.

Massachusetts, however, abandoning its original argument for simple extension, see note 6 supra, would further limit eligibility for AFDC-U by requiring that the parent who meets the employment-related criteria of Section 407 also be the family's "principal wage earner." Under the state's definition of principal wage earner, only the parent who received greater earnings or unemployment compensation benefits during the six months prior to application would be able to establish the family's eligibility for AFDC-U. J.S. of Appellant Sharp at 8a.

Repair of the constitutional infirmity of Section 407 through simple extension of the statute is clearly preferable to invalidation or radical restructuring of the AFDC-U program. The extension remedy is consistent with the

prior decisions of this Court and the congressional policies underlying the AFDC-U program, and is administratively simple to effectuate within the framework of the current AFDC and AFDC-U programs. It also avoids the difficult policy questions that this Court would have to resolve in order to impose a principal wage earner limitation on the AFDC-U program, questions that are appropriately resolved by Congress. For all these reasons, this Court should affirm the decision of the district court to extend AFDC-U benefits to families whose deprivation is the result of the unemployment of either parent, without a principal wage earner limitation.

B. Extension, Not Invalidation, Is The Appropriate Remedy.

Because the decision to remedy a con-

stitutionally defective statute by its very nature requires a court to change a legislative provision, the courts have generally limited themselves to changes that can be executed in the simplest fashion possible. The choice of remedy has accordingly been restricted to whether the statute should be extended to bring in the individuals excluded by the legislature, or invalidated. Welsh v. United States, 398 U.S. 333, 361(1970) (Harlan, J., concurring). Cf. Orr v. Orr, No. 77-1119 (U.S. Mar. 5, 1979), slip op. at 3. When faced with this choice in gender discrimination cases, especially those involving public benefits, this Court has consistently extended the coverage of the infirm statute, usually by effectively substituting one word for another in the defective statute or inserting words into the statute that would expand the class of

individuals to whom it applies. See, e.g., Califano v. Goldfarb, 430 U.S. 199(1977); Jablon v. Secretary of HEW, 430 U.S. 924 (1977), aff'd 399 F. Supp. 118 (D. Md. 1975); Weinberger v. Wiesenfeld, 420 U.S. 636(1975); Frontiero v. Richardson, 411 U.S. 677 39/ (1973).

39/ Extension has similarly been ordered in other equal protection cases involving government benefit programs. See, e.g., Jiminez v. Weinberger, 417 U.S. 628(1974) (extending disability benefits to illegitimate children born after onset of the parent's disability); Memorial Hospital v. Maricopa County, 415 U.S. 250(1974) (extending health care benefits to indigents without regard to length of residency); United States Dep't of Agriculture v. Moreno, 413 U.S. 528(1973) (extending food stamp benefits to households composed of unrelated individuals); New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619(1973) (extending state aid to the working poor to families with illegitimate children); Richardson v. Davis, 409 U.S. 1069, aff'd mem., 342 F. Supp. 588 (D. Conn. 1972) (extending Social Security death benefits to illegitimate children); Graham v. Richardson, 403 U.S. 365(1971) (extending categorical assistance benefits to resident aliens).

The test to determine whether extension or invalidation is the proper remedy for a constitutionally infirm statute was most clearly enunciated by Mr. Justice Harlan in Welsh v. United States, 298 U.S. 333(1970) (concurring opinion). That test, stated briefly, is for the court "to decide whether it more nearly accords with Congress' wishes to eliminate its policy altogether or extend it...to render what Congress plainly did intend, constitutional." Id. at 355-56. In determining which of these remedies Congress would prefer, several factors are relevant. They include the presence or absence of a severability clause in the statute, the extent of Congress' commitment to the underlying policy of the statute, the amount of disruption to the statutory scheme that might accompany extension or invalidation, and the degree to which the remedy selected might

impair legislative goals beyond those recognized by the statute itself. Id. at 365-
40/
66. An analysis of these factors in-

40/ The extension question has been squarely considered by several lower court cases in which the Welsh test has been applied, and extension generally been ordered. See, e.g., Moritz v. Commissioner, 469 F.2d 466 (10th Cir. 1972), cert. denied, 412 U.S. 906 (1973) (extending benefits of a tax deduction statute to never-married males); Vaccarella v. Fusari, 365 F. Supp. 1164 (D. Conn. 1973) (extending benefits of supplemental state unemployment compensation to all workers standing in loco parentis to dependent minors). See also Demiragh v. DeVos, 476 F.2d 403 (2d Cir. 1973); Bowen v. Hackett, 361 F. Supp. 854 (D. R. I. 1973); Miller v. Laird, 349 F. Supp. 1034 (D.D.C. 1972). Extension was also the remedy ordered by the district courts in the two other cases challenging Section 407 on the grounds of gender discrimination. See Stevens v. Califano, 448 F. Supp. at 1323; Browne v. Califano, No. 77-1249, slip op. at 7.

eluctably supports the remedy ordered by the district court in this case -- extension of the AFDC-U program to families with unemployed mothers.

1. The presence of a severability clause in the Social Security Act supports extension.

The severability clause contained in the Social Security Act is evidence that Congress would prefer that an infirm provision of that statute be repaired rather than invalidated. That clause, which governs Section 407, provides:

If any provision of this chapter, or the application thereof to any person or circumstance, is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances shall not be

affected thereby. 42 U.S.C. §1303.

In order to protect "the application" of the "invalid" provision, Section 407, to "other persons," unemployed fathers, extension rather than invalidation of the AFDC-U program should be ordered.⁴¹

2. The congressional commitment to the AFDC-U program supports extension.

As Amici have already demonstrated, the congressional objective in enacting the AFDC-U program was to alleviate the harsh financial and social effects of parental unemployment upon needy families. The legislative history of the program evidences a strong

^{41/} Such relief is also consistent with the remedy selected in Califano v. Goldfarb, 430 U.S. 199, Jablon v. Secretary of HEW, 430 U.S. 924, and Weinberger v. Wiesenfeld, 420 U.S. 636, involving the same severability clause. See also Moritz v. Commissioner, 469 F.2d at 470.

commitment to assisting such families because their deprivation was determined to be as harsh as that suffered by other families eligible for AFDC because of parental death, absence or incapacity. See discussion supra pp. 50-52.

The congressional changes made in the AFDC-U program in 1968, including the change at issue in this case from eligibility based on either parent's unemployment to eligibility based on the father's unemployment only, do not suggest any deviation from the program's original objective. The legislative history demonstrates that the primary focus of the 1968 amendments was on correcting abuses by the states in defining "unemployment," through federalizing the definition of that term. See, e.g., H.R. Rep. No. 544, 90th Cong., 1st Sess. 108(1967), dis-

cussed supra pp. 53-55. The change from "parent" to "father" received little attention, and seems to have been based simply on Congress' sex-stereotypical view that mothers are perennial homemakers and fathers are financial providers. See discussion supra pp.54-56. Clearly, therefore, the change was not such a vital part of the AFDC-U program that Congress would prefer abrogation of that program to a return to the gender-neutral eligibility standard that existed prior to 1968.⁴²

3. Extension can easily be accomplished within the administrative framework of the statute.

Extension of AFDC-U benefits to families of unemployed mothers under the same

⁴²/ Some members of Congress also thought the AFDC-U program would have a positive effect on family stability through the prevention of parental desertion. See discussion supra pp. 59-61. Any such effect would also only be served by extension.

conditions that benefits are now afforded families of unemployed fathers requires minimal judicial tampering with Congress' wording of the statute. Remedyng the state's unconstitutional exclusion of unemployed mothers involves but one change in the text of the AFDC-U provision: substitution of the term "parent" for the term "father". With this minor alteration of language, Section 407 would once again confer benefits on "a needy child... deprived of parental support or care by reason of the unemployment ... of a parent." See Pub. L. No. 87-31, 75 Stat.

^{43/} Indeed, such a change also renders the AFDC-U program consistent with the gender-neutral nature of the rest of the AFDC

^{43/} Extension through similar word substitutions has also been the means reflected in this Court's decisions involving unconstitutionally underinclusive statutes. See discussion supra pp.70-72, and accompanying citations.

program, in which eligibility for assistance is based on the death, absence or incapacity of either parent. See 42 U.S.C. §606(a) ^{44/} (emphasis added).

Administering such an extended AFDC-U program would be no more difficult than administering the AFDC-U program in its unconstitutionally underinclusive form. AFDC-U eligibility would be determined in precisely the same manner whether based on the mother's or the father's unemployment, for each would have to satisfy the same categorical and financial requirements.^{45/} Moreover, although

^{44/} The Task Force on Sex Discrimination has recommended that Section 407's infirmity be cured by amending the statute "to permit families...to qualify for benefits on the basis of the unemployment of either parent." Task Force on Sex Discrimination, Civil Rights Division, U.S. Dep't of Justice, Interim Report to the President 157 (Oct. 3, 1978).

^{45/} See 42 U.S.C. §607 and 45 C.F.R. §233.100 (a)(1)(1977), described in note 7 supra.

some increase in staff hours spent in determining eligibility might be necessary because of the increase in caseload resulting from extension of the AFDC-U program to unemployed mothers, it would be relatively small, for the number of new eligibles is small in comparison to the

^{46/} current AFDC caseload.

Nor should the incremental costs of extending benefits to unemployed mothers impede

46/ Massachusetts' estimate of 8000 new families per year, Affidavit of Jenny Netzer, App. at 54, represents only six percent of the current Massachusetts AFDC caseload of about 125,000 families, 42 Soc. Sec. Bull. 77, Table M-35 (Jan. 1979). Although estimates of the numbers of families that might be added to the AFDC-U rolls in other states are not available, there is no reason to believe they would constitute a larger percentage of the current AFDC caseload in those states than they do in Massachusetts.

extension. Although the marginal costs of extending benefits to unemployed mothers are difficult to estimate, even accepting calculations made by Appellants Massachusetts and the Department of Health, Education and Welfare (HEW), it is clear that the additional costs that would flow from an expanded AFDC-U program are comparatively minor. ^{47/}

47/ The costs of extension are difficult to predict because of the presence of several critical variables in a cost estimate formula: 1) the number of new eligibles, 2) the percentage of those eligibles that will actually participate in the program, and 3) the average expenditure for each recipient. Moreover, there is ample reason to question both HEW's and Massachusetts' estimates. First, the wide discrepancy between the two sets of figures undermines the credibility of both. Second, empirical data from the state of Pennsylvania indicate that Appellant Califano's cost estimates for gender-neutral extension of Pennsylvania's AFDC-U program are triple the actual costs. Opposition of Amicus Curiae, Commonwealth of Pennsylvania, to Appellant Califano's Application for a Stay Pending Appeal at 5, Califano v. Westcott, No. 78-437 (Jan. 2, 1979). This overestimation would in itself inflate HEW's national cost figures. Further, given HEW's failure to explain its methodology, there is no reason [Footnote continued on next page.]

Massachusetts estimates that extension of AFDC-U benefits to unemployed mothers in that state will result in an additional \$21.5 million^{48/} in total annual AFDC costs, Affidavit of Jenny Netzer, App. at 54, while HEW predicts a total increase of \$15.9 million, Application for Stay...of Appellant Califano, No. 78-437 (Dec. 1978), Affidavit

to believe that its cost figures for the remaining states, including Massachusetts, are any more accurate. For discussion of the accuracy of Appellant Sharp's estimates, see pp. 100-108 infra.

^{48/} Massachusetts considers the cost of extension to be \$23 million. Brief of Appellant Sharp at 35. But against this figure must be set off savings to the wholly state-funded general assistance program of \$1.5 million annually for families covered by the extended AFDC-U program who formerly received general assistance benefits. Affidavit of Jenny Netzer, App. at 54. Thus, Massachusetts' estimate of \$23 million has been reduced to \$21.5 million throughout the discussion here.

of Gilbert C. Fisher, App. B at 1.^{49/} Although Massachusetts emphasizes that a \$21.5 million increase in costs in the AFDC-U program would significantly enlarge the current figure of \$30 million, Brief for Appellant Sharp at 36, any increase must be seen in the context of the entire AFDC program. A comparison of the state's estimate of the increased costs of extension to current AFDC costs in Massachusetts, \$480 million annually, 42 Soc. Sec. Bull. 77, Table M-35 (Jan. 1979), reveals that there will be an overall increase of no more than four percent in the costs of the Massachusetts AFDC program.

^{49/} This cost comparison does not take into account Medicaid expenditures, for Massachusetts has not included projections for such expenditures in its calculations.

Nationally, HEW estimates the costs of extension to unemployed mothers at \$283.2 million. J.S. of Appellant Califano at 7 n. 6. Current annual costs of AFDC and AFDC-U nationally are \$10.7 billion and \$515.2 million respectively, 42 Soc. Sec. Bull. 77-78, Tables M-35 and M-36 (Jan. 1979). Thus, although the increase in costs of the AFDC-U program itself might be substantial when compared to the costs of the entire AFDC program nationally, extended AFDC-U would result in an overall increase in costs of less than three percent.

Moreover, this Court has approved extensions which resulted in comparable expenditures. See, e.g., Califano v. Goldfarb, 430 U.S. 199; Jablon v. Secretary of HEW, 430 U.S. 924. In Goldfarb, the Solicitor General estimated additional outlays of

\$447 million in new or increased benefits to 520,000 aged husbands or widowers previously excluded from certain Social Security benefits. Brief for Appellant Califano at 39, Califano v. Goldfarb. The estimated cost increase in Goldfarb was small in comparison to the expenditures for the entire Social Security program, 41 Soc. Sec. Bull. 40, Table M-1 (May 1978), as are the predicted increments in this case small relative to the costs of the entire AFDC program. The cost increase in Goldfarb, comparable to the largest estimate in the present case, was not sufficient to outweigh the policies favoring extension. Surely then, the comparable predicted increase here in both actual dollar and relative costs should not prevent extension of the AFDC-U statute in the limited way ordered

by the district court.^{50/}

The devastating detrimental effect on current AFDC-U recipients of invalidation of the program must also be weighed against any cost considerations. As of July 1978, 24,881 persons in Massachusetts and 510,627 persons in twenty-six states, the District of Columbia, and Guam were receiving AFDC-U benefits. 42 Soc. Sec. Bull. 78, Table M-36 (Jan. 1979). Even more were receiving Medicaid on the basis of their AFDC-U eligibility. Invalidation would result in the severe disruption of the lives of these individuals and of the administration of public assistance in the states in which they reside. Extension would enable these

^{50/} The cost increases here will also be borne by the entire public through the AFDC-U program's open-ended appropriation, not by a public trust fund or private individuals, so that no significant costs will accrue to any single party or group.

individuals, and those rendered newly eligible, to meet the financial and social deprivation occasioned by unemployment, whether that deprivation is attributable to unemployment of the father or the mother.^{51/}

A final consideration in evaluating whether extension can be easily accomplished within the administrative framework of the AFDC-U program is that the program is optional with the states. See 42 U.S.C. §607. A state which does not wish to extend benefits to families with unemployed mothers may therefore elect to withdraw from the AFDC-U program without jeopardizing its participation in the basic AFDC program in which benefits are based on the death, absence or incapacity

^{51/} Extension of course also affords the Westcotts and the Westwoods the relief requested in their complaints, while invalidation places them in the anomalous position of having won their lawsuits but been denied any relief.

of a parent. See 42 U.S.C. §606(a). Invalidation of the AFDC-U program, however, would prevent states from exercising the option to cover any families whose deprivation is the result of parental unemployment, significantly changing the structure of the program envisioned by Congress.^{52/}

Against these considerations, Massachusetts argues that extension of AFDC-U benefits to families in which either parent is unemployed "would work a fundamental change in the nation's system of public assistance [by providing] a guaranteed annual income to all needy families, including the

^{52/}Moreover, invalidation might well also encourage desertion, for it would result in reversion to the pre-1961 program under which two-parent families could qualify for assistance only when one was incapacitated.

so-called working poor...." Brief for Appellant Sharp at 15. This change in administrative framework of the program is said to result from a simple extension of AFDC-U because "the unemployment of either parent [could] trigger assistance regardless of the other parent's employment status." Id. The state reasons that "[i]n this guise, the AFDC-U program would no longer serve just to tide families over the temporary need occasioned by the breadwinner's unemployment. It would instead furnish an indefinite -- perhaps permanent -- supplement to the low wages earned by a family's principal wage earner." Moreover, this supplement would be provided to families whose incomes, the state concludes, render them "not needy by conventional standards."

Id.

But the state's concerns in this area

are not related to adoption of the extension remedy. First there is nothing in a gender-neutral AFDC-U program that "guarantees" the provision of assistance to "the so-called working poor." Under both the current AFDC-U program and a simply extended program the parent applying for assistance must satisfy a series of complex employment-related requirements. See note 7 supra. If these requirements cannot be met, the family will not qualify for assistance even if otherwise "poor."

Second, Massachusetts' hypothesis that "an indefinite . . . supplement to the low wages earned by a family's principal wage earner" might be provided to AFDC-U families, even if true, is irrelevant. It, too, is not the result of an expanded gender-neutral program. Rather, the very

nature of the AFDC program is such that families are entitled to receive aid for as long as they meet the eligibility criteria, be it a few days or a few years. 42 U.S.C. §602(a)(10); 45 C.F.R. §206.10(a)(5)(1977). This would be unchanged by extension of the program.

The state's last concern, that AFDC-U would be provided to families who are "not needy by conventional standards," is also not related to any decision to extend the program. It is the result of the interrelationship between Massachusetts' standard of need and the federally-mandated income disregards, see 42 U.S.C. §602(a)(8), neither of which would be affected by the remedy advocated here.

In sum, the simplicity with which extension can be ordered, the ease with which an extended AFDC-U program can be admin-

istered, the relatively small marginal costs of extension, the desirability of continuing aid to current eligibles, and the ability of states to opt out of the AFDC-U program if dissatisfied, all demonstrate that the AFDC-U* program can be readily extended within the framework of the current law. Moreover, none of the concerns that Massachusetts has raised in objection to simple extension of the program is apposite to that remedy. Under these circumstances, it is clear that the AFDC-U program should be extended to include needy families with children deprived of support or care because of the unemployment of either parent.

C. Any Restructuring of the AFDC-U Program To Include A Principal Wage Earner Limitation Should Be Accomplished By Congress, Not This Court.

1. Difficult policy questions would have to be resolved by the Court in

order to accept Massachusetts' principal wage earner limitation.

Massachusetts' argument that the proper remedy in this case is neither extension nor invalidation of the AFDC-U program, but rather judicial restructuring of the program to include a principal wage earner limitation, is unprecedented.^{53/} Indeed, the issue of the appropriate remedy for unconstitutionally underinclusive statutes has been limited to whether a court should extend or invalidate the statute precisely

^{53/} In the two other cases challenging the constitutionality of Section 407 on the grounds of gender discrimination, this novel scheme was neither advocated by the defendant states of Pennsylvania or Ohio nor ordered by the district courts. In Browne v. Califano, No. 77-1249 at 7, the parties stipulated that simple extension of the AFDC-U program to unemployed mothers was the appropriate remedy. In Stevens v. Califano, 448 F. Supp. at 1323, the state defendant argued for invalidation. In both cases the federal defendant supported extension, the remedy ordered by the district courts.

to avoid the difficult policy questions that are raised if the court is forced to sit as a legislature and evaluate all other possible remedies that might be available. See discussion supra pp. 70-75.

The kinds of policy decisions in which this Court would have to become embroiled in order to restructure the AFDC-U program to include a principal wage earner limitation illustrate why any such restructuring should be left to Congress. First, the Court would have to arrive at an appropriate definition of "principal wage earner." Although Massachusetts proposes acceptance of its definition of the principal wage earner as the parent whose earnings or unemployment compensation benefits were greater during the six months preceding the month of application, reapplication or redetermination of eligibility, the state offers no rationale for this definition.

Why, for example, include any unearned income in the calculation, and if any, why not other unearned income such as workers' compensation, or Social Security benefits? Why is income for the past six months, rather than the past year, or the past three months, or any other time period the relevant income? Why, indeed, is income the only determinant of the principal wage earner, rather than, for example, the number of hours worked? Unless the Court is willing to resolve these questions, it should be reluctant to restructure the AFDC-U program to include a principal wage earner limitation.

A second policy consideration that would have to be weighed by the Court is whether families currently receiving AFDC-U should have their benefits terminated by judicial

decree. Moreover, as Amici have already demonstrated, the termination of eligible individuals involves not only policy considerations but legal ones as well because it would violate the Social Security Act's severability clause, 42 U.S.C. §1303. See discussion supra pp. 75-76.^{54/}

Massachusetts acknowledges that Section 407 of the Social Security Act, with its current limitation of AFDC-U to families with unemployed fathers, has never been interpreted to require that the father be not only unemployed but also the family's principal wage earner. The state has afforded aid to such families regardless of whether the father was the principal wage

earner and HEW, pursuant to federal regulations, has provided federal matching payments on the same basis. See 45 C.F.R. §233.100(1977). Only now, to counter a threatened extension of aid to families with unemployed mothers, does the state suggest that the unemployed parent should additionally be required to establish that he or she is the family's principal wage earner.

The result is that some families in Massachusetts who are currently eligible for and receiving AFDC-U because of the unemployment of the father will lose their eligibility for assistance. This could happen in as many as twenty-nine percent of the currently eligible families, because according to

the Census Bureau figures that the state itself relies on, in twenty-nine percent of two-wage earner families the woman is the

^{54/} Termination of current recipients is also inconsistent with Congress' more specific concern in the AFDC-U and AFDC programs that aid be furnished "to all eligible individuals," 42 U.S.C. §602(a)(10). See, e.g., Philbrook v. Glodgett, 420 U.S. 707 (1975); Townsend v. Swank, 404 U.S. 282, 286 (1971).

principal wage earner.^{55/} If that woman cannot satisfy the existing employment-related requirements of Section 407, the family will lose its assistance benefits despite the father's clear ability to satisfy those requirements. This Court should not permit a principal wage earner test unless it is also prepared to resolve the question of whether currently eligible families should lose their

^{55/} To compare the impact of simple extension of AFDC-U benefits to families in which either parent is unemployed with the impact of the principal wage earner test, Massachusetts relies in part on 1974 Census Bureau data indicating that women earn over fifty percent of the income in twenty-nine percent of two-wage earner families earning less than \$7,000 a year. Affidavit of Jenny Netzer, App. at 54. See discussion infra pp. 110-113. If statistics about families with annual incomes of less than \$7,000 are accurate for making predictions about potential new AFDC-U recipients, they should also be accurate for predictions about current AFDC-U recipients.

assistance benefits.

Another policy issue that must be considered is whether the cost savings attributed to the principal wage earner test by Massachusetts are sufficient to justify its imposition. Moreover, before this issue can be resolved, the accuracy of the state's cost estimates must be assessed, an almost impossible task.^{56/}

Massachusetts estimates that the total additional cost of an AFDC-U program in which either parent's unemployment would qualify the family for assistance would be \$21.5 million per year. See discussion supra, pp. 83-84. The state estimates the additional cost of an

^{56/} Some evaluation of costs is, of course, necessary in choosing between extension and invalidation. See discussion supra pp. 81-87. Cost considerations and, more importantly, the accuracy of cost estimates are even more critical, however, when a novel remedy beyond extension or invalidation is proposed, as in this case.

AFDC-U program with a principal wage earner test at \$3.3 million per year. Affidavit of Jenny Netzer, App. at 55.^{57/} The remedy of simple extension, according to these calculations, would cost the state \$18.2 million more per year than a restructuring of the AFDC-U program to include a principal wage earner test. Yet Massachusetts' calculations are based largely on several assumptions not established by evidence in the record, casting doubt on the accuracy of the state's estimates.

Most open to challenge is the assumption that the participation rate of eligible families in a simply extended AFDC-U program would be fifty percent. Id. at 52. In deriving this figure, the state first cites

^{57/} Massachusetts does not include an estimate for Medicaid costs in either of these calculations.

HEW studies indicating that twenty-five percent of eligible families participate in the AFDC-U program, but then doubles that number. In support of this multiple the state merely speculates that "the AFDC-U program had operated largely to provide a short-term, last-resort source of financial support when a father was between jobs" but would now become a "long-term income supplement for many families." Id.^{58/} The state analogizes this supposed "long-term" nature

^{58/} The seeming basis for this conclusion is Massachusetts' assertion that two-parent families would maintain AFDC-U eligibility by entering and leaving the labor force at opportune times. Brief for Appellant Sharp at 28. Although families might be rendered eligible by the unemployment of first one and then the other parent, the probability of this occurring very often is unlikely because an individual's "unemployment" is just one of the rather complex categorical requirements for receipt of AFDC-U benefits. See note 7 supra.

of the expanded AFDC-U program to the basic AFDC program, see 42 U.S.C. §606(a), in which the participation rate is ninety-five percent of those eligible, according to an HEW estimate. Affidavit of Jenny Netzer, App. at 52. In almost mystical fashion, defying understanding, the ninety-five percent participation rate for basic AFDC is then reconciled with the twenty-five percent participation rate for AFDC-U, and the fifty percent figure emerges. Id. at 53.

The impact on cost estimates of Massachusetts' assumption about participation rates in an expanded AFDC-U program is obvious. By estimating that fifty percent of eligibles will participate, Massachusetts doubles the predicted costs that would result from extension if the participation rate estimated by HEW were used in the calculation.

Also subject to serious question are

Massachusetts' estimates of the costs attributable to an AFDC-U program with a principal wage earner restriction. The basis for these cost estimates involves, again, unsupported assumptions about the number of participants in such a program. Massachusetts arrives at its estimate of 700 newly eligible families by attempting to reduce the universe of potential new eligibles⁵⁹ to account for those assumed to be

^{59/} Because only families with unemployed mothers would be added to the AFDC-U rolls by either the simple extension or the principal wage earner remedy, and under the latter remedy only families in which the mother is the principal wage earner, Massachusetts begins its cost evaluation of the principal wage earner test with an examination of the number of two-parent families in which women earn more than fifty percent of the family's income. The state then assumes that the new recipient population under an AFDC-U program with a principal wage earner test would bear the same proportional relationship to the AFDC-U program's population prior to the decision in this case as families in which the mother is the principal wage earner, bear to families in which the father is the principal wage earner, i.e., twenty-nine to [Footnote continued on next page.]

already receiving AFDC and AFDC-U benefits. Id. at 54-55. This factoring-out of families already receiving benefits,^{60/} while not incorrect conceptually, is based on the questionable assumption that the number of families currently receiving aid and newly eligible under a principal wage earner test is equivalent to the number of families receiving AFDC benefits who have earned income (fifteen percent). Id. at 55. No evidence is cited as support for the validity or accuracy of this measure.

seventy-one percent of all two-parent families with an annual income of less than \$7,000. The resulting figure for the new recipient AFDC-U population under a principal wage earner test, the state estimates, is 2,380.

^{60/} The families "already receiving" benefits are deemed to be those in which "the father is unemployed or incapacitated, although the mother is working." Id. at 55.

Yet Massachusetts' estimates of the costs of a principal wage earner AFDC-U program are determined largely on the basis of this unsupported figure. Because fifteen percent of AFDC families have earned income, the same proportion of Massachusetts' incapacity and AFDC-U cases are assumed to be currently on the AFDC rolls. Therefore, Massachusetts argues, these families are not rendered newly eligible by an expanded AFDC-U program with a principal wage earner test. Id. As a result, out of a universe of 2,380 potential newly eligible families, Massachusetts posits that the actual number of such families is only 700. Id. The validity of the fifteen percent figure in predicting the number of current eligibles and costs is thus critical. Without evidence of both its validity and its accuracy as a measure of the number of families with unemployed or incapacitated

fathers now on the rolls, the state's conclusion that only 700 new families would be added should not be relied upon by the Court as a basis for predicting the cost benefits of a principal wage earner limitation.

Additionally, the state fails to consider the increased administrative costs that would accompany either extension or implementation of a principal wage earner test.^{61/} Although administration of a principal wage earner test would undoubtedly be more costly than simple extension because it would require examination of the work histories of

61/ The importance of an evaluation of administrative costs is illustrated by Jablon v. Secretary of HEW, 399 F. Supp. at 132, in which the administrative costs attendant to implementation of the remedy urged by the defendant were found to be twice the cost savings realized by that remedy.

both parents for the first time,^{62/} the absence of any estimate of administrative costs clearly renders Massachusetts' calculations invalid.^{63/}

62/ For discussion of the costs attendant to extension, see pp. 81-87 supra.

63/ HEW's cost estimates for extension, for example, include a calculation for administrative costs. See J.S. of Appellant Califano at 7 n. 6.

Several other components of Massachusetts' methodology in estimating the comparative costs of the AFDC-U program simply extended and of the AFDC-U program with a principal wage earner limitation are also susceptible to criticism. For example, to the district court, certification of the class was initially "the most difficult hurdle for plaintiff to surmount"; the likely size of the class was no more than 346 families. J.S. of Appellant Califano, App. at 12A, 14A-15A. The state offers no explanation as to why its estimate of the class of new eligibles is more than twenty times as large as the district court estimated the class to be. Massachusetts also makes an allowance for the addition to the AFDC-U rolls of families whose income falls between initial and continuing eligibility limits when con-[Footnote continued on next page.]

From these examples, the difficulties in assessing the accuracy of the state's comparative cost calculations are apparent. In light of these difficulties it is virtually impossible for this Court to determine what the cost savings attributable to the Massachusetts principal wage earner test would be. Congress, not this Court, is plainly the forum appropriate to consider the proposal Massachusetts now presses.^{64/}

sidering the costs of simple extension, Affidavit of Jenny Netzer, App. at 53, but not when estimating the costs of Massachusetts' novel principal wage earner scheme. This unjustified omission skews the relative numbers of participants under the two schemes, creating a discrepancy in costs larger than if the methodology were applied consistently.

^{64/} Even if the state's characterization of the cost savings attributable to the principal wage earner test is accepted, those savings are not sufficient to justify imposition of the test. As Amici have [Footnote continued on next page.]

A fourth policy consideration incidental to adoption of a principal wage earner limitation is the disparate impact that the limitation would have on women, which is substantial.

Massachusetts defines the needy family's principal wage earner as the parent who received greater earnings or unemployment compensation benefits during the six months prior to application for assistance. Although this test is gender-neutral on its face, because

noted, simple extension at a cost of \$21.5 million per year represents an increase in total annual AFDC costs in Massachusetts of only four percent. See discussion supra pp. 83-84. Imposition of a principal wage earner test, costing an estimated \$3.3 million annually, represents a cost increase of about one percent to the Massachusetts AFDC program. Thus, the difference between the two remedies, although arguably significant in dollar terms, represents only three percent of the state's total AFDC costs. Cost savings of this relatively small magnitude should not be relied on to justify imposition of a complex principal wage earner test.

the father has greater earnings in the vast majority of two-wage earner families both in Massachusetts and nationwide,^{65/} the effect of the test is to perpetuate the same kind of gender discrimination that this case was brought to redress.

The 1974 Census Bureau data that Massachusetts uses to compare the impact of simple extension of AFDC-U benefits with the impact of the principal wage earner test indicate that women are principal wage earners in only twenty-nine percent of two-wage earner families earning less than \$7,000 a year. Affidavit of Jenny Netzer,

^{65/} Although data do not seem to be available, because unemployment compensation benefits are related to earnings, women are also likely to have lesser amounts of unemployment compensation than men.

App. at 54. See note 59 supra. Massachusetts thereby acknowledges that the impact of the principal wage earner test falls much more heavily on families in which the mother otherwise satisfies the employment-related criteria of Section 407 than it does on families in which the father satisfies those criteria. The result is that seventy-one percent of the families that would have been rendered eligible for AFDC-U by the extension remedy could be excluded from such eligibility by the addition of the principal wage earner restriction.^{66/} Surely, an adverse impact

^{66/} This is precisely the effect that the Massachusetts proposal would have on the Westcott family, for Cindy Westcott, although otherwise eligible for AFDC-U, has not been the family's principal wage earner. See Plaintiffs' Notice of Massachusetts Planned Action to Terminate the Westcotts' AFDC-U...5, Westcott v. Califano, 461 F.Supp. 737 (D. Mass. 1978).

on women of this magnitude / suggests that any decision to add such a test to the AFDC-U program should be left to Congress.

' 2. The difficulty of predicting the remedy that Congress would select

Consideration of remedies beyond extension or invalidation of the statute should be left to Congress for the further reason that it is difficult to predict the remedy Congress would select. This is well

/Indeed, a March 1976 Bureau of Labor Statistics report indicates that in 1975 women earned more than men in two-wage earner families in only twenty-seven percent of the families with annual incomes of under \$7,000. See Marital and Family Characteristics of the Labor Force in March 1976, BLS Special Labor Force Report 206, Table L, at A-41. Under these figures, even more families - seventy-three percent - might be excluded from eligibility by a principal wage earner test.

illustrated by the congressional response to this Court's decision on extension in Califano v. Goldfarb, 430 U.S. 199. In Goldfarb the Court in effect extended the benefits of the Old Age, Survivors and Disability Insurance Program under the Social Security Act to widowers by eliminating the statutory proof of dependency requirement imposed on them but not on widows. Indeed, this remedy was selected over imposition of the dependency requirement on widows despite the Court's explicit recognition that the general purpose of the

OASDI program is to protect the dependents of covered wage earners. 430 U.S. at 213.

See also Abbott v. Mathews, No. 74-194 (N.D. Ohio, Feb. 12, 1976), aff'd sub nom.

Califano v. Abbott, 430 U.S. 924 (1977);

Jablon v. Secretary of HEW, 399 F. Supp.

118 (D. Md. 1975), aff'd, 430 U.S. 924 (1977);

Silbowitz v. Secretary of HEW, 397 F. Supp.

862 (D. Fla. 1975), aff'd sub nom. Califano

v. Silbowitz, 430 U.S. 924 (1977).^{68/} Congress then reacted to the Court's decision not

by imposing a dependency requirement,

^{68/} In this regard, Massachusetts' reliance on Moss v. Secretary of HEW, 408 F. Supp. 403 (M.D. Fla. 1976), is misplaced, for it was effectively overruled by this Court's decision in Goldfarb. See Stipulation of Dismissal, No. 74-721 (M.D. Fla. July 28, 1977).

but rather by providing that a claimant's Title II benefits would be offset by the amount of any public pension benefit. See P.L. 95-216, §344; S. Rep. No. 95-572, 95th Cong., 1st Sess. 27-28. This selection by Congress of an entirely different way of remedying the statute's prior unconstitutionality makes clear that it is virtually impossible to predict what Congress might ultimately decide as to recasting the benefits at issue in this case.

3. If any prediction can be made about the remedy Congress would select, it is that Congress would favor simple extension without a principal wage earner limitation.

The language and structure of the current AFDC program suggest that Congress would favor simple extension of AFDC-U benefits to families with unemployed mothers without any principal wage earner limitation.

In brief, the statute provides that AFDC

is to be afforded to families with dependent children "deprived of parental support or care by reason of the unemployment...of [their] father." 42 U.S.C. §607(a).

Therefore, a needy family is eligible if the father is unemployed even if the mother is the principal wage earner. Thus the plain language of the statute, the starting point of any analysis, does not support a principal wage earner test.

Although Massachusetts argues that the legislative history of Section 407 demonstrates a congressional intent to impose a principal wage earner test when the statute was amended in 1968, close reading indicates only that Congress amended the statute without fully considering the implications of the change from "parent" to "father." As Amici have already demonstrated, the sparse legislative history that does exist indicates only that this language

change was a mere by-product of Congress' more urgent concern with redefinition of term "unemployment" in the statute. See discussion supra pp. 53-56. The change from "parent" to "father" that accompanied this redefinition reflects simply Congress' stereotypical assumption that mothers in two-parent families were not wage earners. Id.

Indeed, there is no evidence whatever that Congress actually considered the situation of two-parent families with two wage earners, much less decided that only the parent who was the principal wage earner could qualify the family for AFDC-U. The use of the term "breadwinner" in congressional discussions does not support Massachusetts' contention that Congress intended a principal wage earner test, for that word was employed indiscriminately both during Congress' consideration of the 1961 and 1962

AFDC-U legislation providing aid to children deprived because of the unemployment of a "parent," and in Congress' consideration of the 1968 legislation changing "parent" to "father." See discussion supra pp. 52-55. If Congress had intended to provide aid only to families whose principal wage earners were unemployed, surely it would have said so explicitly when it amended Section 407 in 1968.^{69/}

^{69/} HEW, the federal agency charged with administering the statute, has never interpreted Section 407 or its legislative history to require a principal wage earner test. See 34 Fed. Reg. 1146 (Jan. 24, 1969), as amended by 36 Fed. Reg. 13604 (July 22, 1971), 37 Fed. Reg. 12202 (June 20, 1972), 38 Fed. Reg. 18549 (July 12, 1973), 38 Fed. Reg. 26608 (Sept. 24, 1973), 40 Fed. Reg. 50273 (Oct. 29, 1975). The agency also takes the position in this case that the simple extension of AFDC-U to families in which either parent is unemployed is the appropriate remedy. J.S. of Appellant Califano at 6 n.5.

The principal wage earner limitation is also inconsistent with the general structure of the AFDC program. AFDC has since 1935 provided aid to needy families whose deprivation is attributable to the absence, death, or incapacity of either parent. See 42 U.S.C. §606(a). Although the result is that benefits are usually provided to one-parent families, two-parent families have always been eligible for aid if their deprivation results from an inability to provide support or care by either parent. For example, only one parent is usually incapacitated, but the incapacity of either parent will qualify a family for assistance. Massachusetts' proposed remedy would be a departure from this structure, however, for it would provide that the unemployment of only one parent - the one who is the principal wage earner - could qualify

the family for assistance.

There is further direct evidence that if Congress were to explicitly consider reform of the AFDC-U program to render it gender-neutral it would not impose a principal wage earner limitation. For example, although various welfare bills have been recently introduced in Congress to amend the AFDC-U program to provide that the unemployment of either parent would qualify the family for assistance, none of these proposals would also impose a principal wage earner limitation such as Massachusetts proposes.

See H.R. 10711, 95th Cong., 2d Sess. §205
(1978) (introduced by Rep. Ullman, Chairperson
of the House Ways and Means Committee);
S. 2777, 95th Cong., 2d Sess. §101 (1978).

4. Congress will act if it prefers a remedy more complex than straightforward extension.

Whether this Court decides to extend or invalidate Section 407, its decision is of course only a form of tentative adjudication, not a definitive response to any issues raised by the sex classification's unconstitutionality. The ultimate responsibility for the structure of the AFDC-U program, within constitutional boundaries, rests with Congress. Moreover, this is a responsibility that Congress has not hesitated to exercise when it disagrees with judicial interpretation of the statute. For example, in the year following the decision in Philbrook v. Glodgett, 420 U.S. 707 (1975), in which this Court interpreted the former Section 407(b)(2)(C)(ii), 81 Stat. 883, to provide unemployed fathers with the option to receive AFDC-U or unemployment compensation, Congress responded by adopting the present Section 407(b)(2)(C)(ii) which requires that unemployed fathers

both apply for and accept any unemployment benefits to which they may be entitled before eligibility for AFDC-U is determined. P.L. 94-566, §507, 90 Stat. 2688. The congressional response to this Court's decision in Califano v. Goldfarb, 430 U.S. 199, was similarly prompt. See discussion supra pp. 113-116. Finally, if proposals similar to those introduced in the 95th Congress are introduced in the 96th Congress to eliminate the gender-discrimination in the AFDC-U program, see p. 121 supra, Congress will have the direct opportunity to decide whether a principal wage earner limitation should also be added to Section 407.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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No. 78-437

JOSEPH A. CALIFANO, JR., Secretary of
Health, Education and Welfare,
Appellant,

vs.

CINDY WESTCOTT, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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Supreme Court of the United States

October Term, 1978

No. 78-437

JOSEPH A. CALIFANO, JR., Secretary of
Health, Education and Welfare,
Appellant,

vs.

CINDY WESTCOTT, et al.,
Appellees.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

BRIEF OF AMICI CURIAE
CATHY STEVENS, ROSALIE McROBERTS
AND SONJA SMITH

INTEREST OF AMICI CURIAE*

This brief is filed on behalf of Cathy Stevens, Rosalie McRoberts and Sonja Smith, three female residents of Ohio who have supported their respective families throughout their employment careers. When circumstances beyond their control led to their unemployment, they exhausted all resources available to them and thereafter made application for assistance pursuant to the Aid to Families

*Consent to the filing of a brief *amicus curiae* has been obtained from all parties and has been lodged with the Clerk's office.

with Dependent Children-Unemployed Fathers Program (AFDC-U). In both the Stevens and McRoberts cases, the families were seeking medical as well as monetary assistance. This was of special concern to the Stevens family because their daughter was suffering from impetigo and each of the adults faced a potentially serious problem with stomach ulcers. In all three cases the application for assistance under § 407 of the Social Security Act, 42 U.S.C. § 607 (hereafter § 407), was denied by the Ohio Department of Public Welfare because the family breadwinner was the female rather than the male parent. Solely because Cathy Stevens, Rosalie McRoberts and Sonja Smith were the breadwinners in their respective families, all family members were totally excluded from participation in the AFDC-U program. All three joined in a class action challenging the constitutionality of § 407 and the implementing state and federal regulations. In *Stevens v. Califano*, 448 F. Supp. 1313 (N.D. Ohio 1978), their challenge to the statute was upheld. While the State of Ohio elected to alter its program in accordance with the decision of the district court, Secretary Califano appealed that decision directly to this Court. *Califano v. Stevens*, No. 78-449, appeal docketed September 15, 1978. Probable jurisdiction has not as yet been noted.

Since a decision by this Court in *Califano v. Westcott*, No. 78-437, will affect the scope of § 407 and thereby the rights of Cathy Stevens, Rosalie McRoberts, Sonja Smith, and the class they represent, this brief *amici curiae* is submitted. *Amici* urge this Court to affirm the decision rendered by the United States District Court for Massachusetts in *Califano v. Westcott*, No. 78-437.

Amici also believe that the arguments of appellant concerning the appropriate test to be applied when scrutinizing sex-based classifications seriously threaten to under-

mine the prior rulings of this Court concerning the rights of women. *Amici*, therefore, submit this brief in support of this Court's prior rulings in cases involving sex-based classifications.

ARGUMENT

I. Introduction

The facts make clear beyond cavil the operation of the AFDC-U program. Section 407 denies federal financial assistance to families with children who are deprived of parental support or care solely because of a mother's unemployment, while at the same time providing AFDC-U payments to families with children who are deprived of parental support or care solely because of a father's unemployment. The regulations implementing § 407, promulgated by the Secretary of Health, Education and Welfare, do not permit AFDC-U payments to be made to families with needy children who are deprived of parental support or care solely because of the mother's unemployment. However, they do permit AFDC-U payments to be made to families with needy children who are deprived of parental support or care solely because of the father's unemployment.

The unalterable effect of the federal scheme is that a male breadwinner, who meets the requirements, qualifies his family for AFDC-U benefits, but an equally deserving female breadwinner, complying with the same requirements, can never qualify her family for such benefits. *Amici* will demonstrate that there is no important governmental objective served by this sex-based classification and that it is the result of sexually stereotyped thinking on the part of Congress.

II. The Legislative History of the Sex-Based Discrimination in § 407 Demonstrates That It Serves No Important Governmental Objective and That It Is the Result of Sexually Stereotyped Thinking on the Part of Congress

The objective of § 407 was to provide assistance to needy families with dependent children whose deprivation was caused by the unemployment of a parent. See *Batterton v. Francis*, 432 U.S. 416, 421 (1977). Congress did not intend through the adoption of § 407 to deal with the flight of fathers from impoverished, but intact households. This Court, as well as three United States Districts Courts, are in agreement on this point.¹ Even Alexander Sharp, Commissioner of the Massachusetts Department of Public Welfare, and appellant in *Sharp v. Westcott*, No. 78-689, recognizes this (Sharp Br. 14-26). Nevertheless, appellant doggedly asserts before this Court that § 407 was enacted to reduce the incentive for unemployed fathers to desert their families (Br. 11-24). Appellant's insistence on this point is understandable as his entire defense of § 407 is premised upon the dubious interpretation he suggests. An analysis of the statutory history of § 407 demonstrates the error in appellant's position.

The Aid to Families with Dependent Children Program (AFDC) was established by the Social Security Act of

1. In *Philbrook v. Glodgett*, 421 U.S. 707, 710-711, n.6 (1975), Justice Rehnquist, writing for a unanimous Court, stated that the motivation for § 407's provision of benefits exclusively to fathers was Congress' "displeasure with the state practice which had made 'families in which the father is working but the mother is unemployed eligible' for Aid to Families with Dependent Children (AFDC) benefits. See also *Stevens v. Califano*, 448 F. Supp. 1313 (N.D. Ohio 1978), appeal docketed sub nom., *Califano v. Stevens*, No. 78-449; *Westcott v. Califano*, No. 77-222-F (D. Mass., April 20, 1978), prob. juris. noted sub nom., *Califano v. Westcott*, No. 78-437; *Browne v. Califano*, No. 77-1249 (E.D. Pa., June 9, 1978), appeal docketed sub nom., *Califano v. Browne*, No. 78-603.

1935, 42 U.S.C. §§ 301 et seq. It was designed to assist "one clearly distinguishable group of children"; those who had been deprived of the support of a parent due to death, continued absence or physical or mental incapacity of that parent. H. R. REP. NO. 615, 74 Cong. 1st Sess. 10 (1935); 42 U.S.C. § 606(a); see *King v. Smith*, 392 U.S. 309, 328-329 (1968). The loss of a parent of either sex in one of the enumerated ways entitled (and still entitles) the deprived child to claim AFDC assistance.²

In 1961 Congress extended the coverage of the AFDC program to include children in intact families who were deprived of support because of the unemployment "of a parent". Act of May 8, 1961, 75 Stat. 75. As had previously been the case in the AFDC scheme, Congress established a sex-neutral prerequisite (unemployment "of a parent") for AFDC-U eligibility. Despite the utilization of sex-neutral terminology, appellant argues that the 1961 legislation was intended by Congress as a means of dealing with paternal desertion of welfare families. This argument does violence to both the language of the statute and its history.

The AFDC-U program, as originally enacted, was woven into the pattern previously established to assist children deprived of parental support. Like its precursors, AFDC-U was sex-neutral. From all appearances, the objective of the program was to provide assistance to children who had suffered a deprivation due to the unemployment of a parent, not to lure fathers into remaining in welfare homes. If the objective of this legislation was to deal

2. It should be noted that this sex-neutral result was accomplished despite the articulated inclination of Congress to render assistance to families deprived of a "breadwinner", "wage earner" or "father". See *King v. Smith*, 392 U.S. at 328 and n.25, 26, 27 and 28 (accompanying text).

specifically with paternal desertion rather than parental deprivation, the use of a sex-neutral classification was a most curious solution. To explain this anomaly one must hypothesize either an oversight in drafting³ or a congressional understanding of the term "parent" as the equivalent of the word "father".⁴ In either case, the language of the text would be ignored in favor of a conflicting interpretation. Such a reinterpretation is not justified unless the legislative history provides unambiguous support for it.⁵

The legislative history does not support appellant's theory. Rather, it demonstrates that the original AFDC-U program was conceived as an emergency measure of short duration to deal with widespread unemployment in a pe-

3. Appellant does not go so far as to claim such an error in drafting but he does intimate the possibility. In his brief it is suggested that Congress adopted broader language than was necessary, perhaps because of the desire of some Congressmen for a broader program than Congress "really" wanted. While this theory is convenient, it ignores the language of the statute and is without support in the history of the AFDC-U program. See discussion, *infra*, accompanying footnotes 5-11.

4. Because of the frequent confusion of the terms "father", "breadwinner" and "wage earner" in congressional deliberations concerning other AFDC programs, this suggestion may not be entirely unfounded. See, e.g., *King v. Smith*, 392 U.S. at 328 (1968). However, such a solution offers little solace to appellant, because as shown *infra* at Section III(B), it is nothing more nor less than sexual stereotyping of the sort repeatedly condemned by this Court. See *Orr v. Orr*, U.S., 47 U.S.L.W. 4224 (1979); *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

5. For views counselling caution in the use of legislative history and decrying the manufacture of history, see, e.g., *Schwegmann Brothers v. Calvert Corp.*, 341 U.S. 384, 395-397 (Concurrence of Mr. Justice Jackson) (1951); Frankfurter, *Some Reflections on Reading Statutes*, 47 COL. L. REV. 527, 543 (1947); See also HART & SACKS, THE LEGAL PROCESS, 1242-1286 (Tent. Ed. 1958). The approach to legislative history utilized by appellant conflicts with the precepts set forth in these sources.

riod of serious economic recession.⁶ Furthermore, this Court has characterized the original AFDC-U enactment not as a scheme to keep welfare fathers with their families, but as an effort designed to fill the gap in assistance created by the exhaustion of unemployment benefits. See *Batterton v. Francis*, 432 U.S. at 429. The preponderance of the historical evidence demonstrates that the original enactment was designed along with other measures to alleviate "the distress arising from the unsatisfactory performance of the economy."⁷

In 1962 the AFDC-U program was extended for a period of five years without relevant change. Act of July 25, 1962, 76 Stat. 193. Then in 1967, the AFDC-U program was modified by the adoption of overtly sex-conscious language. Benefits under the program would henceforth be restricted to a child who had been deprived of support by reason of the unemployment "of his father". 42 U.S.C. § 607. Appellant insists that this change was undertaken by Congress as part of the effort to "eliminate the structural incentive in the AFDC program that induced paternal desertion." (Br. 19). This suggestion is without merit. The change from sex-neutral to sex-conscious terminology in 1967 did not increase the benefits already available to fathers either directly or indirectly. Nor did it establish disincentives for paternal desertion. Its primary effect

6. The original enactment, intended to last only fifteen months, was proposed as part of an overall relief package along with a bill to extend unemployment benefits. H.R. REP. NO. 28, 87th Cong. 1st Sess. 1 (1961). See also Statement of Secretary of Health, Education and Welfare, Abraham Ribicoff in Hearings on H.R. 4884 Before the House Comm. on Ways and Means, 87 Cong. 1st Sess. 94-95 (1961).

7. President's Message to Congress on Economic Growth and Recovery, 1961 U.S. Code Cong. and Admin. News 1028. For additional evidence upon which this conclusion is based, see Amici's Brief in Support of their Motion to Dismiss or Affirm in *Califano v. Stevens*, No. 78-449, at 8-12.

was to deprive mothers of the opportunity they had previously enjoyed to qualify their families for AFDC-U assistance. Concomitantly, it established an incentive for parental desertion that had not previously existed. In those families where the "breadwinner" mother became unemployed, her intact family was rendered ineligible for AFDC-U assistance. In such a situation, the 1967 change encouraged one parent to desert so as to qualify the remaining family members for AFDC-U assistance. See *Stevens v. Califano*, 448 F. Supp. at 1322.

Given this result, some other reason must be identified as the basis for this change in the AFDC-U program.⁸ The legislative history again establishes the real reason for this revision. Congress was aware that certain states were permitting families to obtain AFDC-U benefits when one parent was employed and the other unemployed. H.R. REP. No. 544, 90th Cong. 1st Sess. 108 (1967); S. REP. No. 744, 90th Cong. 1st Sess. 160 (1967). Providing assistance to families with a working parent was unacceptable to Congress and the 1967 amendments were motivated by a Congressional desire to restrict this practice. See *Philbrook v. Glodgett*, 421 U.S. 707, 710-711, n.6 (1975). However, in enacting new limitations Congress engaged in the most transparent sort of sexual stereotyping. Fathers were assumed to be breadwinners and their unemployment was made the *sine qua non* for assistance. Mothers were assumed to be homemakers and their employment was viewed as irrelevant in determining whether a child had been deprived of support.

Appellant attempts to marshall support for his "deserting father" theory from various 1967 House and Senate

8. See *Orr v. Orr*, U.S., 47 U.S.L.W. at 4227, n.10 (1979).

Reports, as well as the comments of a number of legislators. However, absolutely none of this material indicates why or how converting a previously sex-neutral program to a sex-conscious one would serve to keep fathers at home. The Senate Report upon which appellant places reliance specifically stated that resolution of the problem of deserting fathers was a subject in need of continued congressional study rather than legislative action.⁹

Appellant also relies upon several pages of statistics and scientific report citations concerning abandoning fathers as support for this thesis. However, none of this material was presented to Congress.¹⁰ One searches the legislative history in vain for any discussion of the MOYNIHAN REPORT or its progeny. The reason these materials are not mentioned is that they were not of central concern to Congress when it acted. Appellant has indulged in the fabrication of a convenient *post hoc* rationalization with respect to the history and aims of § 407. Such a rationalization is not supported by the facts and cannot serve as a basis for interpretation of § 407.

9. "The Committee is concerned about the effect that the absence of a State program for unemployed fathers has on family stability. Where there is no such program there is an incentive for an unemployed father to desert his family in order to make them eligible for assistance. This will be a matter of continuing study by the committee." S. REP. No. 744, 90th Cong. 1st Sess. 160 (1967) (emphasis added). This remark was brought to appellant's attention in Amici's Motion to Dismiss or Affirm in *Califano v. Stevens*, but appellant has scrupulously avoided making comment upon its obvious inconsistency with the arguments he makes before this Court. See Motion to Dismiss or Affirm in *Califano v. Stevens*, No. 78-449, 13, n.11.

10. The only statistical reference to abandonment in the whole of the legislative history is a brief reference to the fact that 19% of AFDC recipient families had been deserted by a father. None of the figures appellant laboriously details on pages 30 and 31 of his brief were presented to Congress despite their apparent availability and relevance to the kind of inquiry appellant now contends Congress was undertaking.

III. Section 407 Deprives Female Wage Earners of Rights Guaranteed Under the Constitution

A. Section 407 imposes increased burdens on women attempting to enter the workforce and deprives women workers of protection for their families which men receive as a result of their employment

Appellant would have this Court believe that § 407 does not achieve its objectives "at the needless expense of women." (Br. 36). This contention is incorrect in a number of respects. Most basically, § 407 erects a barrier which keeps women from becoming full participants in the workforce. It does this in family units in which a wife takes on the responsibilities of "providing a home and its essentials" while her spouse (because of skills, health or inclination), undertakes the necessary homemaking responsibilities. Cf. *Orr v. Orr*, U.S., 47 U.S.L.W. at 4227. If she becomes unemployed and cannot obtain unemployment compensation, her prior work efforts cannot qualify her family for AFDC-U assistance. Were this same woman to stay home and compel her husband to perform the breadwinner's function, AFDC-U coverage would be vouchsafed automatically. The lesson is clear. If there is a need in an intact family to have homemaker functions performed, it is up to the wife to perform them. The alternative choice jeopardizes the survival of the family. Section 407 not only penalizes the working wife in intact families, it coerces women in such families to avoid the workforce and to restrict their lives to the role of homemaker.

This disparity violates the rule established by this Court in *Weinberger v. Wiesenfeld*, 420 U.S. at 645 (1975), and reiterated in *Califano v. Goldfarb*, 430 U.S. at 206-

207 (1977), that women who work are entitled to receive the same protection for their families which men receive as a result of their employment. See also, *Orr v. Orr*, U.S., 47 U.S.L.W. 4224 (1979); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

Appellant contends that any burden caused by § 407 falls equally on women, men and children gathered in intact families and is, therefore, not a sex-biased burden. This argument is merely a simplistic restatement of the facts confronting this Court: some needy families receive benefits while others do not. It is the legitimacy for distinguishing between the two classes of needy families which forms the basis for the challenge to § 407.

In analogous situations this Court has invalidated sex-conscious statutes which made it more difficult for a woman's family than a man's family to receive assistance or benefits. In *Frontiero v. Richardson*, 411 U.S. 677 (1973), the plaintiff was denied certain medical benefits and an increased housing allowance because of a proof-of-dependency rule imposed only on female members of the "uniformed forces." The Court overturned this discriminatory program although its impact was felt equally by both plaintiff and her husband. A similar result was reached in *Jablon v. Secretary of Health, Education and Welfare*, 399 F. Supp. 118 (D. Md. 1975), aff'd 430 U.S. 924 (1977). In light of these holdings the argument that equality of injury justifies a sex-biased rule should be rejected.

B. Section 407 is invalid because it is premised upon and perpetuates sexual stereotypes

The § 407 classification is ineluctably sex-based and sex-biased. It conveys a familiar message: the breadwinner who counts is male. The message is delivered in

its most extreme form. A female, despite her demonstrated breadwinner capacity, is not even counted second. She is not counted at all. If this is not sex-role stereotyping, nothing is.

As appellant's analysis demonstrates, § 407 differentiates between two classes of identically situated former breadwinners: the father who stays with his spouse and children because of "conscience and love" (Br. 14, 17), and the mother who remains with her family for the very same reasons. The man's exemplary conduct attracts a monetary benefit for the family, the woman's does not. The sole justification for rewarding father's love while taking mother's for granted is the allegedly "solid statistical evidence" (Br. 23) that most women will voluntarily stay at home while, absent a financial incentive, men will not. On the basis of this empirical evidence, the sex-based generalization is applied. Fathers, because of their sex, qualify their families for benefits whether or not payment is needed to induce the socially desired conduct. Mothers, because of their sex, disqualify their families.

Decisions of this Court establish, as appellant admits, that "no law may be based on sexual stereotypes." (Br. 26). As appellant would now have it, stereotype would mean "unsupported belief," an assumption not supported by "solid statistical evidence." (Br. 33). But this Court has rejected this definition.

For example, while it can be documented that men are generally more active than women in business affairs, a sex-based classification premised upon such evidence is invalid. *See Reed v. Reed*, 404 U.S. 71 (1971). Further, it can be shown that most married women are dependent while most married men are not. Yet a number of sex-based classifications premised on this notion have been voided. *See Orr v. Orr*, U.S., 47 U.S.L.W. 4224

(1979); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Califano v. Goldfarb*, 430 U.S. 199 (1977).

The insidious practice this Court has consistently condemned is the lawmaker's habit of basing statutory schemes on loose-fitting characterizations and outdated misconceptions concerning the role of females in the home rather than in the marketplace and world of ideas. *Orr v. Orr*, U.S., 47 U.S.L.W. 4224 (1979); *Craig v. Boren*, 429 U.S. 190 (1976); *Stanton v. Stanton*, 421 U.S. 7 (1975). Patterning official policy on "the way most men [or women] are" shores up the stereotype and casts the weight of government against the man or woman who would break the sex-typed mold. As this Court recently stated, where "the [government's] compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender-classifies and therefore carries with it the baggage of sexual stereotypes, the [government] cannot be permitted to classify on the basis of sex." *Orr v. Orr*, U.S., 47 U.S.L.W. at 4228.

What is apparent is that appellant misconstrues the meaning of sex stereotyping. It is not myths and false impressions which are rejected by this analysis but rather a standardized mental picture which presents an oversimplified image of the roles and abilities of males and females.

To adopt the test that appellant now seems to espouse would be to undercut the long line of sex-based classification cases previously decided by this Court. As established in *Reed v. Reed*, 404 U.S. at 76 (1971), sex-based classifications "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly situated shall be treated alike". As re-stated in *Craig v. Boren*, 429 U.S. at 197 (1976), this test requires that "classifications by gender must serve

important governmental objectives and must be substantially related to the achievement of those objectives." Appellant would have this Court permit the government to fabricate any sort of *post hoc* theory in defense of challenged sex-based classifications so long as the theory could be supported by some statistical proof. This is not the approach employed by this Court. It foregoes thorough analysis of the actual objectives of the legislation and does not require a determination as to whether the statute actually achieves its objectives. In the present case, appellant's analysis neither honestly identifies the government objectives of the AFDC-U program, nor explains how the sex of the unemployed parent furthers the objective he fabricates. The concoction of a theory and some statistical proof is not enough to save a sex-based classification under the tests of *Reed*, *Craig* and *Orr*. Such a test, if adopted, would signal a return, albeit *sub silentio*, to the "any rational basis" standard no longer applicable in cases of gender discrimination. See *Craig v. Boren*, 429 U.S. at 210-211, n.* (1976) (Powell, J. concurring).

C. The invidious sexual discrimination worked by § 407 cannot be defended on the ground that the section is part of a social insurance program

Perhaps at the core of appellant's contentions¹¹ is the argument that the sexual discrimination worked by § 407 is permissible because it facilitates the administration of a social insurance program. This argument is ob-

11. It is hard to say with certainty what appellant's basic contention is. It may be that the sexual discrimination worked by § 407 is acceptable because it is incorporated in the Social Security Act (Br. 39-40). Or, it may be that "no law may be based on sexual stereotypes." (Br. 26). Or, it may be that the evil to be condemned in sex discrimination cases arises when a
(Continued on following page)

viously premised upon this Court's holding in *Mathews v. Lucas*, 427 U.S. 495 (1976) and on Mr. Justice Rehnquist's comments in his dissenting opinion in *Califano v. Goldfarb*, 430 U.S. at 225. There are, however, a number of problems with this theory. First, it must be noted that such a theory has never been accepted by this Court in any case involving sex-based classifications. Quite the contrary, as the plurality opinion in *Goldfarb* indicates, there is no reason for giving "special deference" to classifications established in social insurance programs like the Social Security Act. *Califano v. Goldfarb*, 430 U.S. at 204, n.4. This teaching simply reiterates the principle established in *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), that classifications established in the Social Security Act are open to the same level of scrutiny as matters not part of that legislative scheme. Certainly no general rule requiring approval of sex-based classifications in social insurance schemes can be found in *Goldfarb* or *Wiesenfeld*,

Further, § 407 is distinguishable from legislation at issue in cases like *Mathews v. Lucas*, 427 U.S. 495 (1976). In *Lucas* the challenged section did not operate to exclude absolutely any class of recipients from assistance. Its thrust was to require illegitimates to prove their dependency in order to qualify for benefits. In the present case there is plainly and simply no way that a family with a female breadwinner can qualify for AFDC-U. This absolute exclusion works a harm precisely like that condemned in *Wiesenfeld*, where the plaintiff was absolutely

Footnote continued—

"gender based distinction produce[s] an unequal division of benefits between men and women that [does] not serve any substantial government interest." (Br. 37). Or it may be any one of half a dozen other variants invented by appellant to avoid confronting this Court's standard applicable in cases challenging sex bias in the Social Security Act. *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Califano v. Goldfarb*, 430 U.S. 199 (1977).

excluded from participating in the benefit scheme in question. See *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); see also *Califano v. Goldfarb*, 430 U.S. at 299 (Rehnquist, J., dissenting). Where a classification absolutely deprives citizens of benefits upon which they rely for support, this Court has on several occasions indicated its intention to focus carefully on the legislative choice made and to reject those choices which are not justified by important governmental objectives.¹² No basis for the adoption of a contrary standard is articulated by appellant in the present case.

The reason usually given to justify classifications like that upheld in *Lucas* and that championed by the dissent in *Goldfarb* is that important considerations of administrative convenience are served by the rule established. See, e.g., *Mathews v. Lucas*, 427 U.S. at 509 (1976). In the present case appellant can advance no such argument because there is no administrative advantage to the sex barrier erected by § 407. No hard issues concerning proof of claim are avoided by the rule and no logically secure discrimination between *bona fide* recipients and the underserving is facilitated. The only end served is the exclusion of a number of admittedly needy claimants from public assistance simply on the basis of the sex of the working parent. The number of such needy individuals is not so great,¹³ and the need is not so difficult to assess, as to justify a rule of complete exclusion.

12. See *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *U. S. Department of Agriculture v. Moreno*, 413 U.S. 528 (1973); Davidson, *Welfare Cases and the "New Majority": Constitutional Theory and Practice*, 10 HARV. CIV. RIGHTS—Civ. Lib. Rev. 513, 541-545 (1975); see also *San Antonio Indep. School District v. Rodriguez*, 411 U.S. 1, 37 (1973); L. Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977).

13. Only 147 of the 48,000 individuals who received AFDC benefits in Ohio from April 1978, through January 1979, received

(Continued on following page)

CONCLUSION

The judgment of the United States District Court for the District of Massachusetts should be affirmed.

Respectfully submitted,

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Footnote continued—

these benefits as a result of the order in *Stevens v. Califano*, 448 F. Supp. 1313 (N.D. Ohio 1978). Ohio Department of Public Welfare, FY 1980-1981, Biennial Budget Requests, House Subcommittee Hearings, Answers to Legislative Budget Office's Questions Relative to Public Assistance Accounts, February 21, 1979, Question 1, p. II/9.

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